

ALL IN THE FAMILY: PROVING THE CASE OF FINANCIAL EXPLOITATION IN NORTH DAKOTA'S AGEING POPULATION

ABSTRACT

Ten thousand Americans turn 65-years-old every day in the United States. Seventy percent of the nation's wealth is concentrated in those born before 1965. In no place are those numbers more evident than North Dakota which boasts the 12th highest proportional number of seniors in the nation. The rise of baby boomers entering retirement age coupled with their relative wealth creates a perfect storm for financial exploitation—and not just by scammers and everyday thieves—but rather by family members who use undue influence, coercion, and deception to gain their inheritance early. By doing so they injure not only their elderly victims, but also North Dakota communities who must then provide for the needs of victims whose hard-earned savings have gone to the coffers of an abuser.

North Dakota attorneys must know the warning signs of family financial exploitation. This knowledge is vital whether a prosecutor is considering a charge of exploitation, or a private attorney is assisting an elder in estate planning. In both instances, family dynamics play an integral role in shaping the approach attorneys take to advance their clients' legal interests. Both types of attorneys can assist in addressing family financial exploitation. Improving the prosecutorial process by collaborating with multiple disciplines can lead to meaningful convictions, while private attorneys can employ tools to protect elder assets and engage in litigation to combat the ramifications of undiscovered exploitation.

Responding to this perfect storm will take knowledge, understanding, and foresight, yet the stakes could never be higher. Our elders deserve protection and their perpetrators deserve justice. North Dakota attorneys must be at the forefront of the fight to ensure its elders age with dignity, respect, and their financial assets fully intact.

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I. INTRODUCTION

North Dakota is home to many treasures. The state boasts Theodore Roosevelt National Park with vast miles of rugged terrain, rocky hills and low valleys dotted with bison, mule deer and prairie dogs.¹ Sweeping skies invite many to partake in both the natural beauty of open spaces and the fertile land that accompanies them. Yet the greatest treasure of North Dakota lies not in its soil but in its people. Generations of Native Americans and settlers have made their home here and passed down a rich tradition of hard work, determination, faith, and family. North Dakota's success depends largely on the lessons taught and passed down by older generations. Elders play an integral role in North Dakota's prosperity by laying a foundation of resiliency passed on to their children and children's children. Yet elders and their financial

1. *Animals – Theodore Roosevelt National Park North Dakota*, NAT'L PARK SERV. (Apr. 10, 2015), <https://www.nps.gov/thro/learn/nature/animals.htm>.

legacies are under attack by the very loved ones they so faithfully served during their lifetime.

A. BY THE NUMBERS

Financial exploitation of American elders is at an all-time high.² One in twenty elders have reported some type of recent financial mistreatment.³ Those numbers are likely deceptively low, however, due to the underreporting often accompanied by financial exploitation crimes that induce shame and fear in their victims. The most troubling aspect of this revelation is that exploitation most often occurs from an elder's family member who holds a position of influence and pressure over their victim.⁴ In fact, it is estimated that 90% of all perpetrators of elder abuse are family members or trusted friends of the victim.⁵

The impact is devastating, not just on a personal level, but on an economic one as well. A recent statistic shows that "almost one in ten financial abuse victims will turn to Medicaid as a direct result of their own monies being stolen from them."⁶ Studies show that the annual financial loss from financial elder abuse is approximately \$2.9 billion.⁷ These numbers reveal an alarming urgency to preserve limited government resources set aside for those who truly need it.

On a broader scale, America's aging population has created a "silver tsunami"—the perfect storm for financial exploitation.⁸ By 2034, Americans 65 and older will, for the first time ever, outnumber those 18 years old and younger.⁹ More than 10,000 Americans turn 65 years or older every day,¹⁰ and with that aging population comes a staggering amount of wealth. Over 70% of the nation's wealth is concentrated in those born before 1965.¹¹ This

2. Katherine Skiba, *Older Americans Hit Hard by Financial Fraud*, AARP (Feb. 28, 2019), <https://www.aarp.org/money/scams-fraud/info-2019/cfpb-report-financial-elder-abuse.html>.

3. *Elder Financial Exploitation*, NAT'L ADULT PROT. SERVS. ASS'N, <https://www.napsa-now.org/get-informed/exploitation-resources/> (last visited Dec. 9, 2020).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Senior Financial Abuse: Undue Influence*, WOMEN'S INST. FOR A SECURE RET./NAT'L ADULT PROT. SERVS. ASS'N (2016), <http://www.napsa-now.org/wp-content/uploads/2016/11/senior-scams-undue-influence-2016.pdf>.

8. Eve Glicksman, *Preparing for the 'Silver Tsunami'*, AM. PSYCH. ASS'N (Oct. 2012), <https://www.apa.org/monitor/2012/10/tsunami>.

9. Danielle Arigani, *Preparing for an Aging Population*, AARP (Jan. 2020), <https://www.aarp.org/livable-communities/about/info-2018/aarp-livable-communities-preparing-for-an-aging-nation.html>.

10. *Aging*, U.S. DEPT. OF HEALTH AND HUM. SERVS. (Sept. 12, 2018), <https://www.hhs.gov/aging/index.html>.

11. *Boomers and Silents Represent 70% of the Wealth and Affluent Market*, MKTG. CHARTS (Feb. 24, 2017), <https://www.marketingcharts.com/demographics-and-audiences/youth-and-gen-x-75103>.

makes sense considering older generations have had more time to earn and accumulate their savings, and pay off significant debt compared to their younger counterparts.¹² As Forbes analyst Neil Howe explains, “It’s a new reality that’s turning seniors into pillars of financial support for their children and grandchildren as well as changing public perceptions of old age.”¹³ The aging of the Baby Boomer population coupled with their comparative wealth creates a recipe for opportunistic exploitation.

In no place is that more evident than in North Dakota. According to North Dakota State University’s (NDSU) Extension program, by 2025 the state’s population of those 65 years and older is expected to increase by 50%, resulting in approximately 148,060 seniors living in North Dakota.¹⁴ In 2030, roughly 30.3% of the state’s citizenry will be 60 years or older.¹⁵ As of 2011, North Dakota had the 12th highest proportion of senior citizens compared to other states in the country.¹⁶ Additionally, North Dakota’s farmland and minerals have created wealthy seniors.

North Dakota is attempting to gauge the damage created by financial exploitation, yet research is relatively minimal. Statistics gathered from the Red River Elder Abuse Forensic Network, a case review team established to gather data and combat elder abuse in eastern North Dakota and western Minnesota, revealed an estimated total \$2,653,700 stolen from vulnerable adults between 2016 and 2018.¹⁷ NDSU’s Extension Service, which provides research on multiple subjects affecting the state, explains this growing problem:

The number of reported cases of financial exploitation in North Dakota related to the growth in oil-related income among many older residents has increased. However, this type of abuse usually is not reported. Research estimates that at least 20 percent of adults age 65 and older have been victimized by financial fraud and abuse.¹⁸

12. *Growing Wealth Gap Between Families with Children and Seniors*, DUKE UNIV. (May 18, 2018), <https://sanford.duke.edu/articles/study-finds-growing-wealth-gap-between-families-children-and-seniors>.

13. Neil Howe, *The Graying of Wealth*, FORBES (Mar. 16, 2018), <https://www.forbes.com/sites/neilhowe/2018/03/16/the-graying-of-wealth/?sh=108893e9302d>.

14. *North Dakota’s Aging Population*, N.D. STATE UNIV. EXTENSION, <https://www.ag.ndsu.edu/extension/features/n-d-2019s-aging-population> (last visited Dec. 9, 2020). [Hereinafter *North Dakota’s Aging Population*].

15. *The Graying of North Dakota*, Aging Servs. Div. N.D. DEP’T. HUM. SERVS. (Dec. 2008), <http://www.nd.gov/dhs/info/testimony/2013/house-approp-hr/brochure-graying-nd.pdf>.

16. *North Dakota’s Aging Population*, *supra* note 14.

17. *Elder Abuse Forensic Network – 2015 Stats, 2016 Stats, 2017 Stats, 2018 Stats*, RAPE AND ABUSE CRISIS CTR. (unpublished reports) (on file with Rape and Abuse Crisis Center, Fargo, North Dakota).

18. *Protect Yourself from Senior Financial Exploitation*, N.D. STATE UNIV. EXTENSION, <https://www.ag.ndsu.edu/aging/posts/protect-yourself-from-senior-financial-exploitation> (last visited Dec. 9, 2020).

With lucrative lands and the wealth generated by them aggressively sought after by families seeking to gain their inheritance early, the situation is ripe for exploitation in North Dakota's heartland.

B. FRAMING THE PROBLEM

While national and regional focus has increased on scammers and financial stranger crimes, little emphasis has been placed on family members as perpetrators—often children, grandchildren, or close relatives.¹⁹ It may be easier to think about exploitation of seniors as an “other” problem that does not involve family as abusers, but research shows the most common perpetrator is a family member 45 years old and living with the victim.²⁰ This reality creates logistical and emotional barriers that prevent elders from reporting their victimization.²¹ Abuser tactics employed by a savvy family member often result in a downplaying of concerns that are brushed under the rug by others in the family or even law enforcement and investigative entities.²²

Prosecutors face a number of barriers in charging and proving familial elder abuse crimes. This is due in large part to the difficulty of proving undue influence, the sheer volume of financial data to uncover, and the complexity of financial crimes often best suited for forensic accountants.²³ These challenges can be remedied by a collaborative approach: working with community professionals and partners to maximize victim safety and offender accountability.²⁴ Additionally, the availability of legal protections to decrease this exploitation through the use of healthcare directives, estate planning, powers of attorney (“POAs”), and guardianships prove to be valuable tools in the face of a growing problem.²⁵ With these tools squarely in the hands of

19. *Elder Fraud*, FBI, <https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/elder-fraud> (last visited Dec. 9, 2020).

20. *Research, Statistics, and Data*, NAT'L CTR. ON ELDER ABUSE, <https://ncea.acl.gov/About-Us/What-We-Do/Research/Statistics-and-Data.aspx> (last visited Aug. 15, 2021); see also Bonnie Brandl, *Working with Older Survivors of Abuse: A Framework for Advocates*, NAT'L CLEARINGHOUSE ON ABUSE IN LATER LIFE (NCALL) 1, 7 (July 2016), <http://s3-us-east-2.amazonaws.com/ncall/wp-content/uploads/2018/12/12072922/GP-Captioned-June2016.pdf>.

21. Brandl, *supra* note 20, at 15.

22. Ann Turner, *Rural Domestic and Sexual Abuse Program Advocates: Making a Difference in the Lives of Older Survivors of Abuse*, NCALL, 1, 5 (2013), <http://s3-us-east-2.amazonaws.com/ncall/wp-content/uploads/2018/12/05155418/RuralToolkit.pdf>.

23. See e.g., Page Ulrey, *Undue Influence*, U.S. DEPT. OF JUST. ELDER JUST. INITIATIVE (Sept. 6, 2016), <https://www.justice.gov/elderjustice/video/undue-influence>; Liz Loewy, *Forensic Accountants and How to Find Them*, U.S. DEPT. OF JUST. ELDER JUST. INITIATIVE (Sept. 15, 2016), <https://www.justice.gov/elderjustice/video/forensic-accountants-and-how-find-them>.

24. *For Professionals*, NCALL, <https://www.ncall.us/for-professionals/> (last visited Dec. 10, 2020); see also Turner, *supra* note 22, at 35.

25. *Module 4: Legal Resolutions and Remedies*, NCALL & ABA COMM'N ON DOMESTIC & SEXUAL VIOLENCE (April 2, 2020), https://ncall-webinars.s3-us-east-2.amazonaws.com/2020webinars/4-2-20_ABA_NCALL.mp4. (legal tools discussed between 20:31 and 51:50 of webinar).

North Dakota attorneys, they can and should serve as safekeepers of the elder generation.

II. FINANCIAL EXPLOITATION: AN OVERVIEW

According to a joint study conducted by the U.S. Departments of Justice and Health and Human Services, elder abuse is defined as “physical, sexual or psychological abuse, as well as neglect, abandonment, and financial exploitation of an older person by another . . . either in a relationship where there is an expectation of trust [or] when an older person is targeted based on age or disability.”²⁶ Financial exploitation is further defined as the “illegal taking, misuse, or concealment of funds, property, or assets of a senior for someone else’s benefit.”²⁷

A. DYNAMICS OF FAMILY ELDER ABUSE

Family elder abuse presents a complex issue made even more difficult by the prevalence of family caregivers who provide a vital service in caring for aging loved ones.²⁸ This position of power can often provide the caregiver with an opportunity to exploit a vulnerable adult with very little oversight.²⁹

Perpetrators sometimes commit their acts overtly through invidious theft of valuable possessions and property or outright withdrawals of cash from shared bank accounts.³⁰ However, family financial abuse is often more veiled. Warning signs of concealed exploitation may appear in an elder’s sudden change in banking practices, abrupt changes to a will or estate planning documents, unexplained transfers of funds, forged documents, or even the arrival of wayward relatives claiming involvement in an elder’s financial affairs.³¹ Unexplained refusals of warranted medical care, sudden cancellation of elderly services, or the acquisition of unnecessary services may also indicate nefarious intent.³²

The complexity of these crimes is increased by the rural living arrangements of the average North Dakota elder.³³ Because North Dakota’s aging

26. Marie-Therese Connolly et al., *The Elder Justice Roadmap*, U.S. DEPT. OF JUST. 1, 3 <https://www.justice.gov/elderjustice/file/829266/download> (last visited Dec. 9, 2020).

27. *What is Elder Abuse?*, ADMIN. FOR CMTY. LIVING, <https://acl.gov/programs/elder-justice/what-elder-abuse> (last visited Apr. 23, 2021).

28. Bonnie Brandl & Jane A. Raymond, *Policy Implications of Recognizing that Caregiver Stress is Not the Primary Cause of Elder Abuse*, 36 J. AM. SOC’Y ON AGING 32, 33 (2012).

29. *Id.* at 34.

30. *Warning Signs*, U.S. DEPT. OF JUST., <https://www.justice.gov/elderjustice/financial-abuse> (last visited Apr. 23, 2021).

31. *Id.*

32. *Id.*

33. ELDER JUSTICE INITIATIVE, RURAL AND TRIBAL ELDER JUSTICE RESOURCE GUIDE, U.S. DEPT. OF JUST. 6 (2018), <https://www.justice.gov/elderjustice/book/file/1110846/download>.

population is scattered throughout rural towns and “large geographical distances[,]” elders are likely to experience “higher rates of social isolation.”³⁴ Rural elders become more vulnerable and may rely on only a handful of providers—often family members—to assist them in meeting their daily needs.³⁵ Their isolation and vulnerability results in fewer opportunities to reach out for help and less access to reporting resources should they experience abuse.³⁶

Another overlooked family dynamic is when ‘caregivers’ are dependent on their elderly family member instead of the other way around.³⁷ Many times an adult child is financially dependent on their parent, perhaps living with them and living off of them with the elder providing food, clothing, and housing.³⁸ These arrangements provide a sense of entitlement to the caregiver who resorts to exerting “power and control” by “using a pattern of coercive tactics to gain and maintain control over the victim.”³⁹ In other cases, elder abuse is intrinsically linked to intimate partner violence or domestic violence that has lingered into an aging couple’s older years.⁴⁰

B. ABUSER TACTICS

Elder abuse research has uncovered a variety of tactics used to perpetrate financial exploitation of a family member.⁴¹ Abusers typically begin by eroding an elder’s sense of self-esteem by questioning their decision-making skills, ridiculing their personal and cultural values, or denying them access to religious services that foster independence and identity.⁴² This psychological abuse makes an elder feel less capable than they truly are, and abusers continue the coercion by speaking for the elder at financial or medical appointments and by making major decisions about what the elder purchases, who the elder sees, or what medical care the elder receives.⁴³ Family members may also engage in a campaign to mislead other family members, healthcare professionals, and attorneys about the elder’s cognitive or decision-making abilities. These tactics further isolate the elder from their support system.⁴⁴

34. *Id.*

35. *Id.*

36. *Id.*

37. Brandl & Raymond, *supra* note 28, at 34.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Abuse in Later Life Power & Control Wheel*, NCALL, http://s3-us-east-2.amazonaws.com/ncall/wpcontent/uploads/2018/12/11123539/NCALL_ALL_Power_Control_Wheel_2016.pdf (last visited Dec. 9, 2020).

42. *Id.*

43. *Id.*

44. *Id.*

Finally, the use of emotional manipulation is also common. Abusers often pressure or guilt their parents for increased access to monies, savings, or land with threats of institutionalization, or the withholding of medical care, assistance with daily needs, or groceries.⁴⁵ Another warning sign includes a caregiver's refusal to secure a higher level of care for their aging parent due to associated costs or the sale of the elder's home (in essence, the abuser's home) if the elder is placed in a facility. An even more sinister approach entails abusers using medications to make their victim more lethargic and manageable or stopping medication administration entirely in an effort to hasten death.⁴⁶ The key takeaway is that abusers target elders' vulnerabilities and use those weaknesses to their advantage.⁴⁷

However, not all abuser tactics involve humiliating or overtly undermining a victim. Abusers have plenty of legal tools to perpetrate theft under the guise of fiduciary power. Because most financial exploitation cases involve perpetrators whom the elder knows, trusts, and has an ongoing relationship with, abusers often use their "real or apparent legal authority (e.g. power of attorney, conservatorship, guardianship) in order to obtain the older person's assets. Others use undue influence to obtain an elder's apparent 'consent' to transactions or activities that benefit the perpetrator."⁴⁸ This may result in an elder being slow to recognize theft and more reluctant to cooperate with investigative entities.⁴⁹

C. BARRIERS TO REPORTING

Elderly victims face a number of real and perceived barriers in seeking intervention to their exploitation.⁵⁰ Like many domestic violence situations, family relationships built over a lifetime do not unravel easily. Victims often love their exploitative family member and while they may want the theft or abuse to stop, they do not necessarily want to see their loved one face criminal prosecution.⁵¹

45. *Id.*

46. Veronica LoFaso, *Heath Care Providers' Role in Identifying and Responding to Older Victims of Abuse*, NCALL & WEILL CORNELL MED. COLL. (Dec. 8, 2016), <http://wcadv.net/Webinars/12-8-16%20NCALL.mp4> (medicating discussed between 34:00 and 34:35 of webinar).

47. Ann Laatsch & Danielle Moise, *Abuse in Later Life: A Webinar Series for Civil Attorneys and Legal Advocates*, NCALL & AM. BAR ASS'N (Feb. 19, 2020), https://ncall-webinars.s3.us-east-2.amazonaws.com/2020webinars/2-19-20_ABA_NCALL.mp4 (targeting vulnerabilities discussed between 48:30 and 49:25 of webinar).

48. Brenda K. Uekert et al., *Prosecuting Elder Abuse Cases: Basic Tools and Strategies*, NAT'L CTR. FOR STATE CTS. & BUREAU OF JUST. ASSISTANCE 1, 1-2 (2012), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/NCSC-Prosecuting-Elder-Abuse-Cases-Basic-Tools-and-Strategies.pdf>.

49. *Id.* at 2.

50. Turner, *supra* note 22, at 8.

51. *Id.*

Cultural or generational values that emphasize privacy of family affairs and increase feelings of guilt and shame also discourage reporting.⁵² Victims buy into their abuser's threats and often question who will take care of them if their child no longer will.⁵³ They also fear loss of the relationship altogether or support from other friends and family who side with the abuser.⁵⁴ There are also barriers regarding the availability of resources to rural areas.⁵⁵ Victims do not know how or who to make reports to and often lack the confidence or even language to describe what is happening.⁵⁶ Victims may also experience barriers not of their own making. Professionals and laypersons may carry their own agist prejudices that lead them to assume a victim lacks competency or capacity to understand their finances.⁵⁷

One major complication to many financial exploitation crimes is that an elder may not recognize their own victimization.⁵⁸ Cognitive and physical impairments hinder prosecutorial efforts by making the victim less likely to recognize red flags, report their experiences, and provide valuable information to law enforcement through reporting, deposition, or testimony.⁵⁹ Yet criminal justice professionals often misunderstand the role that competency, capacity, and consent can play in facilitation of charges.⁶⁰ Crimes targeting children, domestic violence or sexual assault victims, and vulnerable adults all involve similar issues but often move forward without a victim's testimony.⁶¹

III. BUILDING A CRIMINAL CASE

While the task of prosecuting a complex financial crime may appear arduous, there are a myriad of resources available to assist in laying the foundation for a successful conviction.⁶² Long before a charge is filed, teamwork between prosecutors, law enforcement, adult protection, domestic violence agencies, and aging care providers serve as the cornerstone to a successful investigation.⁶³ Collaboration with other disciplines and educating stakeholders, including juries and judges, is key to achieving conviction.⁶⁴ Strategies

52. *Id.*

53. *Id.* at 9.

54. *Id.*

55. *Id.* at 11.

56. *Id.*

57. *Id.*

58. Uekert et al., *supra* note 48, at 2.

59. *Id.*

60. *Id.* at 3.

61. *Id.*

62. *Id.* at 7.

63. *Law Enforcement*, NCALL, <https://www.ncall.us/for-professionals/law-enforcement/> (last visited Dec. 10, 2020); *see also* Turner, *supra* note 22, at 35.

64. Turner, *supra* note 22, at 35.

to prove undue influence and rebut abuser excuses are also vital.⁶⁵ Despite the struggle, success is possible with convictions being seen in North Dakota and regionally.⁶⁶

A. BRINGING A CHARGE

While most financial exploitation cases are brought to the attention of prosecutors by law enforcement tasked with investigating, not all crimes are initially exposed by police.⁶⁷ Law enforcement naturally serves as the main investigative arm for prosecutors, but close relationships with social service providers, domestic violence agencies, and elderly service organizations are imperative to uncovering hidden theft.⁶⁸ These agencies serve as the eyes and ears of the elderly community, building relationships with local families and vulnerable adults who will often reach out to them first for assistance.⁶⁹

Educating agencies and law enforcement on what financial exploitation looks is an important task for prosecutors, whose initial involvement in a case review team can foster a sense of confidence from disciplines who have seen abuse for years without legal intervention.⁷⁰ Additionally, prosecutors must understand how legal tools such as POAs or conservatorships can be used to perpetuate theft and that most statutes have criminal penalties for abusing fiduciary responsibilities.⁷¹

North Dakota has a variety of criminal charges available to prosecutors, but as experts point out, attorneys are encouraged to get creative in the charges they consider.⁷² While traditional crimes related to financial exploitation of an elder or vulnerable adult may appear an obvious choice, other charges linked to petty theft, forgery, abuse of fiduciary responsibilities,

65. Uekert et al., *supra* note 48, at 9.

66. *See generally* State v. Conrad, 2017 ND 79, 892 N.W.2d 200; State v. Campbell, 814 N.W.2d 1 (Minn. Ct. App. Dec. 12, 2012). *Campbell* involved a Duluth police officer who assisted law enforcement in bringing criminal charges against his brother. The brother was eventually convicted of financially exploiting their mother.

67. Page Ulrey & Bonnie Brandl, *Collaboration is Essential: King County's Response to a Case of Elder Abuse and Exploitation*, 36 J. AM. SOC'Y ON AGING 73-78 (Fall 2012) <http://s3-us-east-2.amazonaws.com/ncall/wp-content/uploads/2018/12/04153251/ElderAbuseCollaborationCCR.pdf>.

68. Uekert et al., *supra* note 48, at 23; *see id.* at 17, 20 (listing a variety of disciplines who can serve as witnesses or aid in prosecution).

69. Turner, *supra* note 22, at 35-36 (noting aging service networks and adult protection may witness or hear about abuse from their clients).

70. Uekert et al., *supra* note 48, at 23 (noting prosecutors should play a leadership role in establishing protocols for elder abuse).

71. *Id.* at 8.

72. *Id.* at 7.

fraud (related to credit card, tax, or Medicaid), identity theft, larceny or embezzlement may be options as well.⁷³

State statutes ideal for consideration include North Dakota Century Code section 12.1-23-07, “Misapplication of entrusted property[,]” which creates criminal liability for persons entrusted as fiduciaries who use funds “in a manner that the person knows is not authorized and that the person knows to involve a risk of loss or detriment to the owner of the property. . . .”⁷⁴ Additional charges include section 12.1-23-11, “Unauthorized use of personal identifying information—Penalty[,]”⁷⁵ and section 12.1-23-02, “Theft of property[,]”⁷⁶ which includes key terms such as “exercises unauthorized control,” and “makes [] unauthorized transfer[s] of an interest in, the property of another.”⁷⁷

An important criminal statute, section 12.1-31-07, “Endangering an eligible adult—Penalty[,]”⁷⁸ specifically addresses abuse by a caregiver towards an elder.⁷⁹ The statute defines an “eligible adult” to include anyone 65 years or older or a vulnerable adult.⁸⁰ Notably, the term “undue influence” is defined as “the use of a position of trust and confidence with an eligible adult to exploit or take advantage of that eligible adult through actions or tactics, including emotional, psychological, or legal manipulation.”⁸¹ The statute goes on to define the exploitation of an eligible adult:

A person is guilty of exploitation of an eligible adult if: . . . [they] stand[] in a position of trust and confidence . . . and knowingly, by deception, intimidation, or *undue influence*, obtain[] or use[], or attempt[] to obtain or use, the eligible adult’s funds, assets, or property with the intent to temporarily or permanently deprive the eligible adult of the use, benefit, or possession of the property, for the benefit of someone other than the eligible adult; or [t]he person knows the eligible adult lacks the capacity to consent, and obtains or uses . . . the eligible adult’s funds, assets, or property. . . .⁸²

73. Lori A. Stiegel, *Legal Issues Related to Elder Abuse: A Pocket Guide for Law Enforcement*, AM. BAR ASS’N COMM’N ON L. AND AGING & BUREAU OF JUST. ASSISTANCE 1, 9 (2014), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/ABA-ElderAbuseGuide.pdf>.

74. N.D. CENT. CODE. § 12.1-23-07 (2021).

75. *Id.* § 12.1-23-11.

76. *Id.* § 12.1-23-02.

77. *Id.*

78. *Id.* § 12.1-31-07.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* § 12.1-31-07.1 (emphasis added).

The statute also includes culpability for persons who are engaged in a business relationship with the adult.⁸³ Varying degrees of penalties are instituted depending on the total amount of monies stolen.⁸⁴

Once a violation has been charged, the challenging work of educating judges, opposing counsel, and the jury can begin. It is critically important to use professional resources when building a case. Working with law enforcement, adult protection workers, and advocates is a key factor in successfully charging out a crime.⁸⁵ These individuals can create a safety plan, build trust with an elder, and provide access to medical professionals or caregivers, who are often utilized as witnesses or experts.⁸⁶

B. PERSUADING A FACT-FINDER

Financial exploitation crimes are difficult to prosecute for many reasons. Elder financial abuse is sometimes compared to the struggle prosecutors faced in handling domestic and sexual violence cases 40 years ago.⁸⁷ The legal community and public in general are largely uneducated and unaware of the dynamics of elder abuse, and many mistake criminal activity for actions best reserved for civil court.⁸⁸ As Dr. Brenda Uekert and her team of medical and legal experts explain, there are often “misperception[s] by public [and] criminal justice professionals that misuse of an elder’s assets by persons who have apparent legal authority to make decisions on behalf of the elder is always a civil matter and not criminal conduct.”⁸⁹

This confusion is illustrated in a criminal case originating out of New York City involving Brook Astor, heiress and philanthropist, who was a victim of exploitation by her son and estate attorney.⁹⁰ The two men were convicted of fraud, conspiracy, and forgery.⁹¹ The theft came to light after her grandsons discovered she had been severely neglected and sought to remove their father as guardian.⁹² The trial lasted nearly 19 weeks with much of the testimony focused on Astor’s mental state and capacity to make changes to

83. *Id.*

84. *Id.* § 12.1-31-07.2.

85. *Working Effectively Together to Address Abuse in Later Life*, NCALL, http://s3-us-east-2.amazonaws.com/ncall/wp-content/uploads/2018/12/04150151/Abuse_Later_Life_Collaborations.pdf (last visited Dec. 10, 2020).

86. Turner, *supra* note 22, at 24, 26.

87. *An Overview of Elder Abuse: A Growing Problem*, NCALL, http://s3-us-east-2.amazonaws.com/ncall/wp-content/uploads/2018/12/04145814/Overview_Elder_Abuse.pdf (last visited Dec. 10, 2020) (noting “elder abuse lags far behind [child abuse and domestic violence] in terms of recognition and attention.”).

88. Uekert et al., *supra* note 48, at 2.

89. *Id.*

90. *Id.* at 24.

91. *Id.*

92. *Id.*

who controlled her financial matters and the extent to which her son had abused his power of attorney privileges.⁹³

As lead prosecutor Liz Lowey explained, there were misconceptions that a criminal case could not move forward unless civil proceedings had been resolved.⁹⁴ Many also assumed that Astor's son could claim a "beneficiary defense" by arguing that because he was set to inherit her funds anyway, accessing them early did not create criminal culpability.⁹⁵ There is, of course, no penal exception for family members who steal from their relatives.⁹⁶ Lowey further explained that proving undue influence involved presenting testimony from a number of witnesses, including Astor's nurse, who testified that Astor was "dragged" into a room to sign a document that she had never seen before, and then upon exiting asked what had just happened.⁹⁷

Undue influence is a difficult concept to prove in a court of law. However, evidence can be presented to lay the foundation for this vital component. Testimony from friends, family, adult protection workers, financial advisors, medical providers, and attorneys who have visited the victim's home, assisted in reviewing financial statements, or are familiar with the victim's relationship with the abuser, can provide valuable insight into the coercion used against them.⁹⁸ These witnesses can also testify to the victim's capacity, wishes, and mental state at various times during the exploitation.⁹⁹ *Crawford v. Washington*,¹⁰⁰ a case in which the Supreme Court prohibited certain types of hearsay from admission if deemed "testimonial," may create an additional evidentiary burden.¹⁰¹ However, many statements made by a victim or elicited by professionals and laypersons are not testimonial in nature.¹⁰²

Experts assert that it is best to approach elder abuse prosecution as one would approach a homicide case—assume the victim is unavailable to testify.¹⁰³ Lack of capacity may create unavailability, but there are strategies to work around this hurdle. Capacity is defined as "mental skills . . . that people use in everyday life. Capacity can fluctuate over time and can differ depending on the situation or task. [It] may be impaired by illness, dementia . . . or other cognitive conditions. In order to give consent, one must have mental

93. *Id.*

94. *Id.* at 25.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 11.

100. 541 U.S. 36 (2004).

101. *Id.* at 68.

102. Uekert et al., *supra* note 48, at 11.

103. *Id.* at 12.

capacity.”¹⁰⁴ Abusers often argue they had the victim’s consent, but lack of capacity can be a strong counterargument to this defense.¹⁰⁵

The same testimony that proves undue influence can be helpful in proving capacity. Witnesses can provide a “historical . . . baseline” about the elder’s “behaviors, level of functioning, independence, decision-making ability, [and] others with whom he or she associated.”¹⁰⁶ Providing context to a jury about the victim’s life, behaviors, and decision-making is particularly relevant to the matter of consent.¹⁰⁷ The use of medical experts to evaluate the victim and their medical records can provide valuable testimony regarding consent.¹⁰⁸ Alternatively, a perpetrator may argue a victim’s incapacity led the perpetrator to make “authorized” financial decision-making through the use of a POA or other legal tool.¹⁰⁹ This argument can be rebutted through the use of financial experts who can educate a jury on the duty of fiduciary responsibility in relation to POAs, gift and tax laws, or Medicare and Medicaid eligibility.¹¹⁰ With these tools and strategies, a prosecutor can build a successful case.

IV. THE ROLE OF THE PRIVATE ATTORNEY

Private attorneys and general practitioners play a vital role in preventing financial exploitation of seniors.¹¹¹ Families seek advice from estate and tax attorneys on how to best secure assets, plan for alternative decision making, and prepare for long term care needs through the creation of wills, trusts, and other advanced directives.¹¹² If attorneys approach these conversations with concern for their client, they will be more adept at noticing warning signs, such as a client “[requesting] financial arrangements that appear to disproportionately benefit their caregiver or others at the expense of the client.”¹¹³ Additionally, it is essential private attorneys are properly educated on how financial and decision-making tools can be used to prevent future exploitation.

104. *Id.* at 3.

105. *Id.* at 9, 11.

106. *Id.* at 11.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 20.

111. *Civil Attorneys*, NCALL, <https://www.ncall.us/for-professionals/civil-attorneys/> (last visited Dec. 11, 2020).

112. *Consumer Reports*, NAT’L ACAD. OF ELDER L. ATT’YS., https://www.naela.org/Web/ConsumerResources/ImportTemp/Consumer_Resources_Landing_New.aspx?hkey=1e07503a-588d-4e61-98c0-a975d05fb4a6 (last visited Dec. 11, 2020).

113. *Module 2: Forming the Relationship with Your Client*, NCALL & ABA COMM’N ON DOMESTIC & SEXUAL VIOLENCE (Mar. 5, 2020), https://ncall-webinars.s3.us-east-2.amazonaws.com/2020webinars/3-5-20_ABA_NCALL.mp4 (quoting slide 19 at 10:52 of webinar).

A. LEGAL TOOLS FOR PREVENTION

To lay the groundwork for understanding how attorneys can be used to prevent, mitigate, or accidentally aid in financial elder abuse, it is important to remember an attorney's ethical obligations to the profession and their client. First, an attorney is prohibited from assisting a client to engage in fraud, misrepresentation, theft, or other crimes under the North Dakota Rules of Professional Conduct.¹¹⁴ Second, an attorney may break confidentiality to prevent their client from using lawyer resources to commit a crime that is reasonably certain to result in substantial financial harm to someone, and may do so even if the client has already acted in order to prevent or mitigate the consequences of financial harm.¹¹⁵ Finally, and most importantly, an attorney is allowed to take protective action if they are concerned their client has diminished capacity and substantial harm may come to them.¹¹⁶

With this foundation laid, general practitioners can meet with elderly clients knowing they have ethical support from their profession to prevent financial exploitation. One of the best strategies to avoid unintentionally aiding a perpetrator in their efforts to change a will or create a POA is to thoroughly vet an elder and any accompanying family to make sure there are no signs of coercion, undue influence, or incapacity affecting their decision.¹¹⁷ Suggested questions include whether an elder has been asked recently by certain family members to change an existing will or for access to certain funds or property.¹¹⁸ Additional questions include whether an elder feels safe in their home or if the person of potential concern is with them for the visit.¹¹⁹ Speaking with an elder away from the family that brought them there is another tool to encourage safe discussion.¹²⁰ Framing the one-on-one conversation as something an attorney requires will reduce pressure on the elder to make the decision to speak alone with their potential abuser present.¹²¹ While it may seem awkward to engage in this type of dialogue, experts encourage practitioners to be honest with their client about the reasons for their inquiries, and in doing so build trust with their client so they can share that same honesty.¹²²

114. N.D. R. PROF. CONDUCT 1.6(e)(1), (2).

115. N.D. R. PROF. CONDUCT 8.4(a).

116. N.D. R. PROF. CONDUCT 1.14.

117. *Module 2: Forming the Relationship with Your Client*, *supra* note 112, at 12:40-13:05.

118. *Id.* at 13:56-14:13.

119. *Id.* at 13:08-13:30.

120. *Id.* at 26:08-27:50 (posing a sample situation about when it is appropriate to visit with an elder without family present).

121. *Id.* at 27:20-27:40.

122. *Id.* at 12:40-13:05.

It is equally important to be prepared for an answer that indicates abuse.¹²³ Disclosures of coercion, abuse, or threats will often be “coded.”¹²⁴ This means an elder may discuss a family member’s temper, or direct the attorney to simply do whatever a family member wants.¹²⁵ It might also include hints that a caregiver or child will be upset if they don’t take a certain legal action.¹²⁶ It is important that civil attorneys know of resources aside from legal remedies that can assist their clients. Developing a relationship with adult protection workers, domestic violence agencies, or other service providers for the possibility of referral makes for a well-rounded attorney.¹²⁷ It is also important to reassure an elderly client that confidentiality surrounding their disclosure is privileged.¹²⁸

Another concern for most private attorneys working with elders is capacity. An attorney should be particularly cautious before moving forward if they have concerns with a client’s diminished capacity at the time services are sought. This caution applies to the creation of wills, healthcare directives, and POAs, or if a family member appears aggressive or pushy.

A variety of legal tools can be used to prevent financial exploitation. However, these tools also come with the risk they could be used to perpetuate abuse. One example is a durable financial POA, which designates an agent to make financial decisions upon a principal’s incapacitation.¹²⁹ This tool is beneficial in that it gives an elder a safe person to make financial decisions in the event they are incapacitated, but the agent is also given tremendous power, especially if they create a false perception the elder has diminished capacity.¹³⁰ Another tool to mitigate damages is to assist a competent elder in revoking whatever power they have given to someone who turns out be an abuser.¹³¹ POAs are beneficial in that they can be revoked by the principal. This ability to easily rescind financial power allows elders to reduce the potential for damages and quickly end an abuser’s access to their finances.

While attorneys can use legal tools to prevent abuse, some situations will end up in litigation. Elder law attorneys and general practitioners can assist an elder in bringing a suit against their abuser through a fraud, misrepresentation, or conversion claim, breach of fiduciary duties, obstruction of a trust

123. *Id.* at 23:35-25:45.

124. *Id.* at 15:32-16:38.

125. *Id.*

126. *Id.*

127. *Id.* at 25:15-25:35.

128. *Id.* at 28:35-29:10.

129. *Module 4: Legal Resolutions and Remedies*, NCALL & ABA COMM’N ON DOMESTIC & SEXUAL VIOLENCE (Apr. 2, 2020), https://ncall-webinars.s3.us-east-2.amazonaws.com/2020webinars/4-2-20_ABA_NCALL.mp4 at 41:57- 42:33 (see slide 42).

130. *Id.* at 46:10-46:30.

131. *Id.* at 44:57-45:34.

account, or eviction.¹³² Additionally, attorneys can assist by helping an elder close or freeze compromised bank accounts, remove account holders, negotiate the return of stolen funds, create a constructive trust, or reform a deed.¹³³ The same strategies employed by prosecutors to prove undue influence, coercion, and incapacitation can be used in civil litigation. With a variety of legal options available, private attorneys play a vital role in combating the ramifications of undiscovered exploitation.

B. TWO SIDES OF THE SAME COIN

Two recent North Dakota cases reveal not only the complexity of financial exploitation cases but their intersection between criminal and civil law as well. The first case involved an adult daughter who stole over \$450,000 from her dementia-laden mother, leaving her without the necessary funds to pay for care as she aged.¹³⁴ The other involved an elderly man living in a nursing home who was denied Medicaid after his son stole thousands of dollars leaving him unable to pay for his long-term care expenses.¹³⁵ Elders who have been financially exploited face these devastating consequences on a regular basis. Fraudulent transfers of funds from bank accounts during the five-year look back period prior to application often leave elders ineligible for Medicaid once their savings have been depleted by an abuser.¹³⁶

In *State v. Conrad*, the Court made it clear that financial exploitation of an elder is not only a matter for civil court.¹³⁷ The case was appealed by the Cass County State's Attorney's Office who charged Caroline Conrad with theft of property under North Dakota Century Code section 12.1-23-02(1) and financial exploitation of a vulnerable adult under North Dakota Century Code section 12.1-32-07.1(1)(b) after she stole over \$450,000 for her own personal use from her mother's bank account with whom she was listed a "joint owner."¹³⁸

The district court dismissed the charges finding the matter fell under the civil dispute doctrine which delegates certain disputes to civil court if "there is a legitimate dispute about a unique issue of property, contract, or civil law upon which an element of the charged offense turns; or . . . there is a legitimate dispute about an issue traditionally and more appropriately settled in a

132. *Id.* at 52:21-53:50.

133. *Id.*

134. *State v. Conrad*, 2017 ND 79, ¶ 2, 892 N.W.2d 200.

135. Brief for Appellant, at *5-6, *Ring v. N.D. Dept. of Hum. Servs.*, 2020 ND 217, 950 N.W.2d 142.

136. Jennifer Goldberg, *Elder Financial Abuse and Medicaid Denials*, NAT'L CTR. ON L. & ELDER RIGHTS 1, 3 (May 2017), <https://ncler.acl.gov/pdf/Elder-Financial-Abuse-and-Medicaid-Denials.pdf>.

137. *Conrad*, 2017 ND 79, ¶ 1, 892 N.W.2d 200, 201.

138. *Id.* ¶ 2.

civil forum.”¹³⁹ The district court’s analysis focused on Conrad’s defense that her mother “gifted” her the money as soon as she added her name to the account and whether her mother had the requisite “donative intent” at the time the addition occurred.¹⁴⁰ The court found this was a “unique issue of property, contract, or civil law.”¹⁴¹

The North Dakota Supreme Court explained that this doctrine only applies to situations in which the dispute might impact the public rather than issues arising between two individual parties.¹⁴² The Court further affirmed that an “inter vivos gift” and subsequent donative intent are questions of fact “based upon the particular circumstances of any given situation.”¹⁴³ The court elaborated:

A victim’s donative intent to make an inter vivos gift is not a “unique” property law issue that affects anyone other than the persons involved in the dispute. Extending the civil dispute doctrine to cover the issue in this case would allow dismissal of criminal theft charges every time a defendant claims stolen property was given to him by the alleged victim. This is not the type of “unique” issue contemplated by the civil dispute doctrine. Rather, as in *Perreault*, 2002 ND 14, ¶ 11, 638 N.W.2d 541, Conrad’s claim of a gift “does no more than raise a factual question encompassed in the general issue of whether [Conrad] is guilty of theft” or exploitation of a vulnerable adult.¹⁴⁴

Additionally, in order to charge the crime of theft, it must be proven that the perpetrator took the “property of another.”¹⁴⁵ The district court properly found that a joint owner of a checking account can still be charged with theft if “the State . . . [establishes] that someone other than the defendant had an interest in the property which the defendant was not privileged to infringe without consent.”¹⁴⁶

The case was remanded back to district court where Conrad pled guilty to both charges.¹⁴⁷ She was sentenced to 60 days in jail but was allowed to execute her sentence on electronic home monitoring.¹⁴⁸ Conrad was also

139. *Id.* ¶ 3.

140. *Id.* ¶ 4.

141. *Id.*

142. *Id.* ¶ 17.

143. *Id.* ¶ 18.

144. *Id.*

145. *Id.* ¶ 8 (citing N.D. CENT. CODE § 12.1-23-02(1)).

146. *Id.* (quoting *State v. Kaufman*, 310 N.W.2d 709, 713 (N.D. 1981)).

147. See Dave Olsen, *Woman Accused of Stealing From Mother Ordered to Pay Back Over \$500,000*, INFORUM, Jan. 23, 2018, <https://www.inforum.com/news/4392434-woman-accused-stealing-mother-ordered-pay-back-over-500000>.

148. *Id.*

ordered to pay \$504,300 in restitution.¹⁴⁹ This case illustrates that exploitation involving an elder and adult child as joint-account holders can be prosecuted under exploitation charges. More importantly, it shows that North Dakota prosecutors are willing to challenge questionable judicial decisions thus making important progress in the fight against elder abuse.

A similar case occurred on the other side of the state in Renville County, although no criminal charges were brought in connection to the matter.¹⁵⁰ The situation involved a 95 year old retired farmer, Harold Ring (Harold), who moved into Mohall's Good Samaritan Nursing Home in 2018 to join his wife who was already residing there.¹⁵¹ The Director of Social Services became increasingly concerned for Harold's safety and financial situation when she witnessed his son "forcefully" yell at Harold to sign a check in the amount of \$5,000 to a person Harold did not know.¹⁵² The director then assisted Harold in reviewing his bank statements and discovered that his accounts had been completely depleted.¹⁵³ Upon this discovery, Harold became very upset and cried.¹⁵⁴ Soon after, Harold's daughter returned home from overseas to handle the crisis and eventually received POA privileges to manage his affairs.¹⁵⁵

Further investigation revealed that most checks from Harold's accounts had been forged or cashed by his son and made out to unknown persons.¹⁵⁶ His son was not his power of attorney and was not a joint account holder of any of the bank accounts in question.¹⁵⁷ Adult protection had been involved on numerous occasions in regard to concerns over the son's treatment towards Harold. Despite reports being made to law enforcement, Harold's son was "never prosecuted due to prosecutorial discretion."¹⁵⁸

Since Harold's funds, including the proceeds that came from the sale of his \$197,000 home, were depleted, he was forced to apply for Medicaid in an effort to remain in the nursing home.¹⁵⁹ Unfortunately, his application was denied due to "disqualifying transfers" of funds taken from Harold's accounts with nothing legitimate to show for the withdrawals.¹⁶⁰ Although it was well

149. *Register of Actions*, State v. Conrad, 2017 ND 79, 892 N.W.2d 200 (No. 09-2015-CR-04077), <https://publicsearch.ndcourts.gov/CaseDetail.aspx?CaseID=3390470> (last visited Dec. 16, 2020).

150. Brief for Appellant, *supra* note 134, at *6.

151. *Id.* at *5

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at *6.

156. *Id.*

157. *Id.* at *8.

158. *Id.* at *6.

159. *Id.* at *6-7.

160. *Id.* at *7.

established that coercion and fraud led to the disqualifying transfers, the North Dakota Department of Human Services denied the application “regardless of potential criminal activity.”¹⁶¹ The disqualifying transfers totaled over \$157,000.¹⁶²

Harold appealed the Department’s Medicaid denial and the case was brought before an administrative law judge for review.¹⁶³ He argued that he was “financially exploited by his son and did not transfer any property for the purpose of becoming eligible for Medicaid nursing home care.”¹⁶⁴ He further argued the Department of Human Services failed to protect him as a vulnerable adult and thus questioned their decision to deny him Medicaid benefits.¹⁶⁵ The case was appealed to the North Dakota Supreme Court who remanded it back to district court to determine whether the action survived Harold’s death, as he passed away while litigation was pending.¹⁶⁶

The case leaves a great deal of lessons in its wake. First, Harold interacted with a number of different agencies during his exploitation. The nursing home became aware of the theft relatively late but further investigation revealed a history of adult protection reports and concerns. A strong, coordinated community response facilitated by multiple agencies—nursing home, financial institution, adult protection, law enforcement, private attorneys, and the state’s attorney’s office—can make a huge difference in the outcomes to cases like these. Additionally, Medicaid denials due to fraudulent transfers unknown to the victim are a real problem for elders whose life savings are lost without their knowledge.¹⁶⁷ Finally, Harold discovered the theft at the very end of his life, and in many ways, it broke his heart. The human toll and its impact are visible far beyond the financial costs to the community at large.

V. CONCLUSION

In conclusion, elder financial exploitation needs to be on every attorney’s radar. Whether an attorney works with an elderly client to create a simple will or a family member seeks advice on a situation in which they believe their loved one is being exploited, all general practitioners must be prepared to handle these issues. Judges, prosecutors, and defense attorneys must possess a firm understanding of the dynamics of elder abuse, so they are prepared to address it in courtroom settings and legal decisions across the state.

161. *Id.*

162. *Id.*

163. *Id.* at *10.

164. *Id.*

165. *Id.*

166. *Id.* at *8.

167. Goldberg, *supra* note 135, at 3.

The financial exploitation of elders has huge implications for the economic and social welfare of North Dakota. Most importantly, however, North Dakota elders deserve to age with integrity and respect. To lose their life savings at a time when they need it most by the people whom they trusted should fuel the passion of a North Dakota legal community committed to doing all it can to serve this worthy population.

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