

# **Should Financial Institution Employees Be Mandated Reporters of Financial Elder Abuse?**

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## **1. INTRODUCTION**

The purpose of this paper is to analyze the structures and uses of current mandatory reporting laws for financial institutions in other jurisdictions and advocate that Minnesota develop and implement their own mandatory reporting laws for financial institution employees when they suspect financial elder abuse. Financial abuse and exploitation of the elderly is a growing problem, and is expected to continue to rise in prevalence. Many argue that employees of financial institution, particularly banks, are in an ideal position to detect and protect against financial elder abuse.

This paper will establish the background of financial elder abuse, including exploring its various definitions and its prevalence, as well as discussing the typical profiles of both the abused and the abusers. It will also do the following: examine the past relationship between financial elder abuse and financial institutions, and scrutinize numerous mandatory reporting laws governing financial institutions that are currently in place in other jurisdictions as well as the challenges the legislatures faced in implementing them. Additionally, it will address the ongoing problems with and arguments against mandatory reporting laws for financial institutions, as well as solutions to overcome or soften these arguments. Finally, it will introduce draft legislation whose text is based on laws in several jurisdictions that have already successfully implemented similar laws.

## **2. DEFINING FINANCIAL ELDER ABUSE**

The definition of financial elder abuse varies depending on the source. According to the National Center on Elder Abuse (NCEA), “financial elder abuse,” or “exploitation,” is illegal taking, misuse, or concealment of funds, property, or assets of a vulnerable elder.<sup>1</sup> Examples include, but are not limited to, cashing an elderly person's checks without authorization or

permission; forging an older person's signature; misusing or stealing an older person's money or possessions; coercing or deceiving an older person into signing any document (e.g., a contract or will); and the improper use of conservatorship, guardianship, or a power of attorney.<sup>2</sup>

Statutes also seek to define financial elder abuse; legal definitions are often more comprehensive than those articulated by organizations such as the NCEA. For example, the California Welfare and Institutional Code defines “financial abuse of an elder” as occurring when a person or entity does any of the following:

(1) Takes, secretes, appropriates, or retains real property of an elder or dependent adult to a wrongful use or with intent to defraud, or both; (2) assists in taking secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.

(b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith.

(1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative.

(2) For purposes of this section, a person or entity should have known of a right specified in paragraph (1) if, on the basis of the information received by the person or entity or the person or entity’s authorized third party, or both, it is obvious to a reasonable person that the elder or dependent adult has a right specified in paragraph (1).<sup>3</sup>

Minnesota law defines as follows:

Subd. 9. “Financial exploitation” means:

(a) In breach of a fiduciary obligation recognized elsewhere in law, including pertinent regulations, contractual obligations, documented consent by a competent person, or the obligations of a responsible party under section 144.6501, a person:

(1) engages in unauthorized expenditure of funds entrusted to the actor by the vulnerable adult which results or is likely to result in detriment to the vulnerable adult; or

(2) fails to use the financial resources of the vulnerable adult to provide food, clothing, shelter, health care, therapeutic conduct or supervision for the vulnerable adult, and the failure results or is likely to result in detriment to the vulnerable adult.

(b) In the absence of legal authority, a person:

(1) willfully uses, withholds, or disposes of funds or property of a vulnerable adult;

(2) obtains for the actor or another the performance of services by a third person for the wrongful profit or advantage of the actor or another to the detriment of the vulnerable adult;

(3) acquires possession or control of, or an interest in, funds or property of a vulnerable adult through the use of undue influence, harassment, duress, deception, or fraud; or

(4) forces, compels, coerces, or entices a vulnerable adult against the vulnerable adult's will to perform services for the profit or advantage of another. <sup>4</sup>

Even though the precise definition of the term "financial elder abuse" varies depending on the defining authority, adult protective services statutes in 49 states and the District of Columbia now recognize financial abuse or exploitation as a reportable form of elder abuse. <sup>5</sup>

#### **A. PREVALENCE OF FINANCIAL ELDER ABUSE**

In 2003, Adult Protective Services Divisions (APS Divisions) for all 50 states, the District of Columbia, and Guam, investigated 38,680 reports of financial exploitation of adults age 60 and over. <sup>6</sup> This number accounted for 20.8% of all reports of abuse investigated by APS Divisions. Of these 38,680 reports, 10,569 were substantiated, accounting for 14.7% of all substantiated reports of elder abuse. <sup>7</sup>

These numbers showed a significant increase from the amount of substantiated cases reported in 2000. <sup>8</sup> The 2000 report showed investigation of 38,714 reports of financial elder abuse, making up 13% of all reports, 16,679 were substantiated, accounting for 9.8% of all substantiated reports of elder abuse. <sup>9</sup>

“The incidence of elder abuse is increasing because of three factors; (1) the increase in the elderly population; (2) a high percentage of elders live alone; and (3) the elderly are worth exploiting.”<sup>10</sup> As the baby boomer generation ages, the number of “elderly” individuals in the United States will increase like never before. The United States Census Bureau reported that in 2005, individuals ages 65 and over accounted for 12.4% of the population.<sup>11</sup> That number is expected to jump to 16.3% by 2020, and 20.7% by 2050.<sup>12</sup> In Minnesota alone, individuals ages 65 and over made up 12.1% of the population in 2004, expected to increase to 12.4% in 2010 and to 18.9% in 2030.<sup>13</sup>

In 2003, 10,091,000, or 29.8% of all individuals ages 65 and over lived alone.<sup>14</sup> This factor can be particularly restricting for some elders suffering from financial elder abuse, as well as other types of abuse, specifically those with mental and/or physical disabilities.<sup>15</sup> In 2003, 28,231,000 individuals ages 65+ suffered from some type of disability; either sensory, physical, mental, self-care, or go-outside home.<sup>16</sup>

The elderly are often targeted because they are easy to exploit. Many elderly victims fail to report crimes of abuse to the police or even to their own families out of shame or embarrassment.<sup>17</sup> Some want to stop the exploitation and recover their assets, but are less interested in seeing perpetrators punished.<sup>18</sup> Many have close ties or relationships to their abusers, which they want to preserve.<sup>19</sup> They may want to protect abusive family members, particularly when the abuser is a troubled son or daughter.<sup>20</sup>

Others fail to report because they do not want to draw attention to the fact that they are having problems managing on their own and fear that disclosure will result in nursing home placement or guardianship.<sup>21</sup> Because victims are often induced to cooperate in their own exploitation, they may believe that they are fully or partially to blame for their victimization.<sup>22</sup>

Many people do, in fact, blame victims or hold them responsible, assuming that they brought their problems upon themselves through greed, imprudence, or naiveté.<sup>23</sup>

## **B. VICTIM AND PERPETRATOR PROFILES**

Although the exact profile of a financially abused elder is unavailable, there are significant data available for elder abuse in general. For all types of elder abuse, the study found that in the fifteen states reporting, 65.7% of elder abuse victims aged 60 and over were female. Twenty states were able to break down the ages of abuse victims into ten year increments. For those states, 20.8% of victims were between the ages of 60 and 69, 36.5% were 70 to 79, and 42.8% were 80 years of age and older.<sup>24</sup>

In the thirteen states that provided data on race, the majority of victims aged 60 and over who experienced some type of elder abuse were Caucasian (77.1%), followed by African American (21.2%), American Indian and Alaskan Native (0.6%), Asian (0.5%), Native Hawaiian and Pacific Islander (0.2%), and “Other” (0.2%).<sup>25</sup> Eleven states reported that 52.7% of the alleged perpetrators against individuals aged 60 and over were female.<sup>26</sup> For the seven states reporting ages for alleged perpetrators, 4.3% were under 18 years of age, 10.6% were 18-29, 16.1% were 30-39, 25.6% were 40-49, 18.5% were 50-59, 11.2% were 60-69, 7.9% were 70-79, and 5.8% were over 80 years of age.<sup>27</sup>

What is particularly saddening specifically about financial elder abuse is the fact that this type of abuse often occurs at the hands of family members or caretakers, individuals whom the elder feels he or she can trust.<sup>28</sup> Eleven states provided information on the relationship of the perpetrator to the victim; the most common relationship was that of adult child (32.6%), followed by other family member (21.5%), unknown relationship (16.3%), and spouse/intimate partner (11.3%).<sup>29</sup>



### **C. SIGNS OF FINANCIAL ELDER ABUSE**

**Signs and symptoms of financial** elder abuse or material exploitation include but are not limited to: sudden changes in bank account or banking practice, including an unexplained withdrawal of large sums of money by a person accompanying the elder; the inclusion of additional names on an elder's bank signature card; unauthorized withdrawal of the elder's funds using the elder's ATM card; abrupt changes in a will or other financial documents; unexplained disappearance of funds or valuable possessions; substandard care being provided or bills unpaid despite the availability of adequate financial resources; discovery of an elder's signature being forged for financial transactions or for the titles of his/her possessions; sudden appearance of previously uninvolved relatives claiming their rights to an elder's affairs and possessions; unexplained sudden transfer of assets to a family member or someone outside the family; the provision of services that are not necessary; and an elder's report of financial exploitation.<sup>30</sup>

### **3. VIEWS REGARDING FINANCIAL INSTITUTIONS AS MANDATORY REPORTERS OF SUSPECTED FINANCIAL ELDER ABUSE**

Because of the alarming statistics documenting financial elder abuse and the expected boom in the elderly population as the baby boomers age, the issue of whether or not banks and other financial institutions should be mandated reporters of suspected financial elder abuse has come front and center. Both proponents and opponents of mandatory reporting laws for banks and other financial institutions set forth arguments attempting to support their positions.

<sup>1</sup> National Center on Elder Abuse, <http://www.elderabusecenter.org/default.cfm?p=basics.cfm> (last visited Sept. 7, 2007).

<sup>2</sup> *Id.*

<sup>3</sup> Cal. Welf. & Inst. Code §15610.30 (West 2001).

<sup>4</sup> Minn. Stat. Ann. §626.5772, subd. 9 (West 2006).

<sup>5</sup> Sandra L. Hughes, *Can Bank Tellers Tell? – Legal Issues Related to Banks Reporting Financial Abuse of the Elderly*, at 6, 2003, [http://www.elderabusecenter.org/pdf/publication/bank\\_reporting\\_long\\_final\\_52703.pdf](http://www.elderabusecenter.org/pdf/publication/bank_reporting_long_final_52703.pdf) (last visited Sept. 22, 2007). (The Oregon APS statute is the only APS statute that does not identify financial abuse as a reportable form of abuse. The Oregon APS agency, however, has adopted administrative rules that contain an expanded definition of abuse. This expanded definition includes “Financial exploitation, which is the illegal or improper use of another individual’s resources for personal profit or gain.”).

<sup>6</sup> National Center on Elder Abuse, *The 2004 survey of state adult protective services: abuse of vulnerable adults 18 years of age and older*, available at [http://www.ncea.aoa.gov/NCEAroot/Main\\_Site/pdf/2-14-06%20FINAL%2060+REPORT.pdf](http://www.ncea.aoa.gov/NCEAroot/Main_Site/pdf/2-14-06%20FINAL%2060+REPORT.pdf) (last visited Oct. 22, 2007). Unless noted, the statistical information in this section is based on a study commissioned by the National Center on Elder Abuse and prepared by the National Committee for the Prevention of Elder Abuse and the National Adult Protective Services Association. This report was prepared in 2004 and focused on fiscal year 2003.

<sup>7</sup> *Id.*

<sup>8</sup> National Center on Elder Abuse, *A response to the abuse of vulnerable adults: The 2000 Survey of State Adult Protective Services*, at 28, Table 10, 2000, available at [http://www.ncea.aoa.gov/NCEAroot/Main\\_Site/pdf/research/apsreport030703.pdf](http://www.ncea.aoa.gov/NCEAroot/Main_Site/pdf/research/apsreport030703.pdf) (last visited Oct. 22, 2007).

<sup>9</sup> *Id.*

<sup>10</sup> Terrie Lewis, *Fifty Ways to Exploit Your Grandmother: the Status of Financial Abuse of the Elderly in Minnesota*, 28 Wm. Mitchell L. Rev. 911, 913-914, 2001.

<sup>11</sup> US Census Bureau. *Census 2006 Statistical Abstract*, at 14, Section 1. <http://www.census.gov/compendia/statab/2006/population/pop.pdf> (last visited Sept. 22, 2007).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 25, Table 21.

<sup>14</sup> US Census Bureau, *supra* note 11, at 38, Table 35.

<sup>15</sup> Lisa Nerenberg, *Forgotten Victims of Elder Financial Crime and Abuse*, at 4, August, 1999. <http://www.elderabusecenter.org/pdf/publication/fvefca.pdf>. (Physically or cognitively impaired seniors often find the criminal justice system incomprehensible and inaccessible. Physical disability prevents some from coming to police stations, prosecutors’ offices, or court).

<sup>16</sup> US Census Bureau, *supra* note 14.

<sup>17</sup> Nerenberg, *supra* note 15, at 4.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> National Center on Elder Abuse, *supra* note 9, at 19. The information contained in this paragraph is from the 2004 Survey by the National Center on Elder Abuse; the survey, however, was unable to break the abuse victim profiles down for different types of abuse.

<sup>25</sup> *Id.*

<sup>26</sup> National Center on Elder Abuse, *supra* note 9, at 20.

<sup>27</sup> *Id.*

<sup>28</sup> Sue Burt, Wolters Kluwer Financial. *Reporting Elder Financial Abuse* (July 2006).

<sup>29</sup> National Center on Elder Abuse, *supra* note 26.

<sup>30</sup> National Center on Elder Abuse, <http://www.elderabusecenter.org/default.cfm?p=basics.cfm>, (last visited Sept. 2, 2007).