

ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672

8901 SENATE JUDICIARY

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costs of

(A) administering the fund; and

(B) the department in conducting activities under this section and AS 37.15.560 - 37.15.605, including the costs of issuance and administration as defined in AS 37.15.605;

(2) shall spend money from the Alaska clean water fund to pay

(A) into the bond redemption fund (AS 37.15.565), and into any other bond redemption fund or account created by a relevant bond resolution, the amount certified by the state bond committee under AS 37.15.585; and

(B) the costs of the state bond committee in conducting activities under this section and AS 37.15.560 - 37.15.605, including the costs of issuance and administration as defined in AS 37.15.605.

* Sec. 8. AS 46.03.032(g) is amended to read:

(g) A municipality or other qualified entity wishing to borrow money from the Alaska clean water fund shall demonstrate to the satisfaction of the department that it [THE MUNICIPALITY]

(1) has sufficient legal authority to incur the debt for which it is applying; and

(2) will establish and maintain a dedicated source of revenue or other acceptable revenue source for repayment of the loan and sufficient reserves for the loan as may be necessary.

* Sec. 9. AS 46.03.032(j) is amended to read:

(j) Except as necessary to comply with the covenants of a bond resolution under AS 37.15.573, a [A] loan made by the department shall be made according to the standards, criteria, and procedures established by regulations under this section. A loan made from the Alaska clean water fund may be subject to the state aid intercept provisions of AS 37.15.5. Except as necessary to comply with the covenants of a bond resolution under AS 37.15.573, in [IN] making a loan from the Alaska clean water fund for a solid waste management system [FACILITY], the department shall give priority to a project that will alleviate severe health or environmental concerns in the community or region proposing the system

1 [FACILITY]. In addition, the department may consider

2 (1) the extent of local or regional support for the proposed system
3 [FACILITY]; and

4 (2) the extent to which the applicant can demonstrate that the full range
5 of solid waste management options has been reasonably considered and that the
6 proposed system [FACILITY] is consistent with the promotion of the solid and
7 hazardous waste management practices established in AS 46.06.021 [IN THE
8 FOLLOWING ORDER OF PRIORITY:

9 (A) WASTE SOURCE REDUCTION;

10 (B) RECYCLING OF WASTE;

11 (C) WASTE TREATMENT; AND

12 (D) WASTE DISPOSAL].

13 * Sec. 10. AS 46.03.032(k) is amended to read:

14 (k) The department shall prepare reports required by the federal government
15 in conjunction with federal capitalization grant award conditions. The department
16 shall also prepare reports and notices, including notices of default, required by
17 the state bond committee in conjunction with bonds issued under AS 37.15.560 -
18 37.15.605. The department shall also prepare a biennial report on the Alaska clean
19 water fund and notify the legislature that it is available on or before the first day of
20 each first regular session of the legislature.

21 * Sec. 11. AS 46.03.032(o) is amended to read:

22 (o) In this section,

23 (1) "other qualified entity" means an intermunicipal or interstate
24 agency as those terms are used in 33 U.S.C. 1383, and may include an authority,
25 corporation, instrumentality, enterprise, or other entity formed through an
26 agreement between a municipality and one or more other governmental entities
27 under AS 29.35.010(13) or under art. X, sec. 13, Constitution of the State of
28 Alaska, or between a municipality and a regional housing authority under
29 AS 18.55.996(b):

30 (2) "solid waste management system [FACILITY]" includes capital
31 improvements and equipment used for the purpose of solid and hazardous waste source

1 reduction, recycling, treatment, or disposal.

2 * Sec. 12. AS 46.03.032 is amended by adding a new subsection to read:

3 (p) Regulations adopted by the department under this section that would affect
4 issuance or repayment of revenue bonds under AS 37.15.560 - 37.15.605 may not be
5 inconsistent with those statutes or with regulations adopted by the state bond
6 committee under those statutes. To the extent that regulations adopted by the
7 department are inconsistent with AS 37.15.560 - AS 37.15.605, with regulations
8 adopted by the state bond committee under those statutes, or with the covenants of a
9 bond resolution adopted under AS 37.15.573, the provisions of AS 37.15.560 -
10 37.15.605, the regulations adopted under those statutes, and the covenants of the bond
11 resolution govern.

12 * Sec. 13. The provisions of AS 37.15.583(b), enacted by sec. 2 of this Act, have the effect
13 of changing Rule 3, Alaska Rule of Civil Procedure by limiting, to the Superior Court for the
14 State of Alaska, First Judicial District at Juneau, the venue district in which a proceeding
15 under AS 37.15.583(a), enacted by sec. 2 of this Act, may be commenced and conducted.

16 * Sec. 14. The provisions of AS 37.15.583(b), enacted by sec. 2 of this Act, take effect
17 only if sec. 13 of this Act receives the two-thirds majority vote of each house required by
18 art. IV, sec. 15, Constitution of the State of Alaska.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 19, 1996

The Honorable Robin Taylor
Chairman, Senate Judiciary
Committee
Alaska State Legislature
State Capitol, Room 30
Juneau, AK 99801-1182

Re: CSSB 207
Alaska Clean Water Fund

Dear Senator Taylor:

This letter will describe the reasons for the Administration's proposed amendments to CSSB 207, the bill to allow leveraging of the Alaska Clean Water Fund.

Amendment 1

The first amendment clarifies and corrects the bond cap language. Section 37.15.560(b) in CSHB 401, on page 2, lines 14-17, provides that

The state bond committee may not issue more than \$15,000,000 in revenue bonds during a fiscal year, excluding refunding bonds. The total amount of revenue bonds outstanding at any one time may not exceed \$150,000,000, including principal and interest owed on the bonds.

Under the proposed amendment, the bond cap language would read:

The state bond committee may not issue more than \$15,000,000 in revenue bonds under AS 37.15.560 - 37.15.605 during a fiscal year, excluding refunding bonds. The total unpaid principal amount of revenue bonds may not exceed \$150,000,000, including refunding bonds, but excluding refunded bonds, issued under the provisions of AS 37.15.560 - 37.15.605.

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 451-2811
FAX: (907) 451-2846

P.O. BOX 110300-DIMOND COURT HOUSE
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-6735

The proposed amendment clarifies that the total cap excludes refunded bonds, as refunded bonds are generally considered no longer to be a liability of the issuer. The annual cap excludes refunding bonds, but the total cap includes refunding bonds.

We also propose deleting interest from the total cap. The inclusion of interest creates unnecessary ambiguities; for example, is the interest that is to be taken into account the interest owing or due this fiscal year, or is it the total interest that will be paid on the bonds to their maturity, but which is not yet "owed." How is interest on a variable rate bond calculated for purposes of the cap?

Finally, we have added references to the bond legislation to eliminate the possible interpretation that the cap computation includes other types of bonds that the State Bond Committee is authorized to issue.

Amendment 2

Amendment 2, on page 4, line 6, is a grammatical clarification that limits the scope of the term "money and revenue" in section 37.15.570(c). This section identifies the money and revenue that the State Bond Committee may pledge to secure the bonds. The original text of HB 401 had included the term "such money and revenue" to refer back to the categories of money and revenue that could be pledged. The CS deleted the word "such" for purposes of conforming to legislative drafting style recommendations. However, in this case, strict adherence to the drafting style recommendations does not accurately reflect the intent that only the identified sources of money and revenue may be pledged.

Amendment 3

Likewise, amendment 3 restores the original language from HB 401 to the state aid intercept provision, section 37.15.575 on page 5, line 8. The intent of this section is that the State Bond Committee can provide written notice to any state agency that might be holding funds payable to a municipality. By substituting the word "the" for "any," the CSHB 401 suggests that only one state agency is the custodian of municipal funds, which is not accurate.

Amendment 4

Amendment 4 inserts the word "bonds" at the end of the sentence on page 6, line 23, referring to the issuance, exchange or sale, and delivery of refunding bonds. This amendment corrects a typographical error, an omitted word.

The Honorable Robin Taylor
Chairman, Senate Judiciary Committee
CSSB 207 - Alaska Clean Water Fund

March 19, 1996
Page 3

Thank you for your consideration of these proposed amendments. Please do not hesitate to contact me if you require further assistance.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: *Marie Sansone*
Marie Sansone
Assistant Attorney General

BMB/MS/lmt

cc: Keith Kelton, DEC
Ross Kinney, DOR
Lee Sharp, bond counsel
Pat Pourchot, Legislative Director
Deborah Behr, Legislation Attorney

AMENDMENT

OFFERED IN THE SENATE

TO: CSSB 207

Amendment 1: Clarification in the bond cap language.

Page 2, lines 14 - 15:

Following "revenue bonds"

Insert "under AS 37.15.560 - 37.15.605"

Page 2, line 15:

Following "total"

Insert "unpaid principal"

Page 2, line 16:

Following "bonds"

Delete "outstanding at any one time"

Insert ", including refunding bonds, but excluding
refunded bonds, issued under the provisions of AS
37.15.560 - 37.15.605,"

Page 2, lines 16-17:

Following \$150,000,000

Delete ", including principal and interest owed on the
bonds"

Amendment 2: grammatical clarification (limit scope of term 'money and revenue').

Page 4, line 6:

Following "pledge of"

Insert "such"

Amendment 3: grammatical clarification (singular to plural).

Page 5, line 8:

Following "default to"

Delete "the"

Insert "any"

Amendment 4: correct typographical omission.

Page 6, line 23:

Following "refunding"

Insert "bonds"

TONY KNOWLES
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

P.O. Box 110001
Juneau, Alaska 99811-0001
(907) 465-3500
Fax (907) 465-3532

207

January 8, 1996

The Honorable Drue Pearce
President of the Senate
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear President Pearce:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill to authorize the state bond committee to issue and sell state revenue bonds to fund public wastewater treatment systems, solid waste management systems, nonpoint source water pollution control projects, and estuary conservation and management projects. This bill also authorizes the Department of Environmental Conservation to use the Alaska clean water fund, a revolving loan fund, as security for the payment of the principal and interest on the bonds, provided the bond proceeds are deposited in the fund. By using the fund as security for the bonds, the state will be able to leverage or increase the amount of money in the fund that is available to municipalities and state agencies for water pollution control projects.

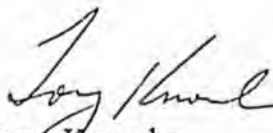
Section 2 of the bill provides the legal framework for the bond issuance and sale. This section is patterned after the international airports revenue bonds statutes, and establishes a cooperative relationship between DEC, which administers the Alaska clean water fund, and the state bond committee, which will administer the bond program. The bill requires the state bond committee to conduct its activities in the best interests of the state and its inhabitants, in a manner that will accomplish the most advantageous sale of the bonds, with due regard for the continued funding of projects under the Alaska clean water fund program.

The Honorable Drue Pearce
January 8, 1996
Page 2

Sections 3-12 of the bill amend the clean water fund loan program to clarify the statute. It authorizes DEC to use the fund to secure state-issued bonds and to make other amendments necessary to acknowledge the bond-issuance and repayment process.

I urge your prompt consideration and passage of this bill.

Sincerely,



Tony Knowles
Governor

SB

211

**SENATE COMMITTEE REPORT
First Committee of Referral**

DATE: 1/10/96

FURTHER: Judiciary

Date of 5-Day Notice: 2/29/96
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 3/8/96

The State Affairs Committee considered SB 211

"An Act relating to sexual assault; and relating to endangering the welfare of vulnerable adults and neglect of vulnerable adults."

and recommends:

- be replaced with _____ CS SB 211 (STA)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to the _____ Committee

- Senate Bill:
- same title
 - new title
- House Bill:
- same title
 - technical title
 - new: SCR# _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
<i>[Signature]</i>	✓				
<i>[Signature]</i>	✓				
<i>[Signature]</i>	✓				
<i>[Signature]</i>	✓				
<i>[Signature]</i>	✓				
<i>[Signature]</i>	✓				
CHAIR: <i>[Signature]</i>	✓				

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
Administration	3/7	0	
Corrections	3/1	0	
Law	3/6	0	

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

COMMITTEE REPORTS

APPROPRIATION -- no fiscal note

*include fiscal notes accompanying Governor's bill

FISCAL NOTE

N 3

Bill Version: CS SB 211(CSTA)

(S) Publish Date: 3/11/96

STATE OF ALASKA
1996 LEGISLATIVE SESSION

Revision # ate: _____ Dept. Affected: Department of Law
 Title: "...relating to endangering the welfare of BRU: Criminal Division
vulnerable adults and neglect of vulnerable adults." Component: Criminal Division
 Sponsor: Senator Ellis
 Requester: Senate State Affairs Committee COMPONENT SERIAL NO. 2085

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: \$ 0.0

POSITIONS

POSITIONS	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

In addition to clarifying language in the state's sexual assault statutes, AS 11.41.410 and AS 11.41.420, this bill establishes two new crimes, endangering the welfare of a vulnerable adult and criminal neglect of a vulnerable adult. The bill provides that a person commits the crime of endangering the welfare of a vulnerable adult if the person intentionally deserts the vulnerable adult in any place under circumstances creating a substantial risk of physical injury to the vulnerable adult and the vulnerable adult is entrusted to the person's care by law. This crime would be punishable as a class C felony.

The bill further provides that a person commits the crime of criminal neglect of a vulnerable adult if the person fails without lawful excuse to provide support for the vulnerable adult and the vulnerable adult is entrusted to the person's care by law. This crime would be punishable as a class A misdemeanor.

Prepared by: Richard I. Peques, Director Phone: 465-3672
 Division: Administrative Services Division Date: 3/6/96
 Approved by Commissioner: Bruce M. Botelho, Attorney General Date: 3/6/96
 Agency: Department of Law

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. SB 211

ANALYSIS CONTINUATION:

Instances of this conduct are somewhat infrequent, occurring every year or two. However, when they do occur they are of great public concern. Due to the infrequency of this conduct ,there will not be a fiscal impact for the Department of Law.

FISCAL NOTE

No. 2

Bill Version: CS SB 211 (STA)

(S) Publish Date: 3/11/96

STATE OF ALASKA
1996 LEGISLATIVE SESSION

Revision Date: _____ Dept. Affected: Corrections
 Title: An Act relating to sexual assault; and relating to BRU: ALL
endangering the welfare of vulnerable adults and neglect Component: _____
 Sponsor: Senator Ellis
 Requester: House State Affairs COMPONENT SERIAL NO. #0694

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: \$ 0.0

POSITIONS

POSITIONS	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill amends AS 11.41.410 (3) (B)(ii) and AS 11.41.420 (a)(2)(B)(ii) by including 1st Degree and 2nd Degree Sexual Assault language to include care providers who are licensed by the State, and by adding new language to AS 11.51.200; specifically (b) Endangering the welfare of a vulnerable adult is a class C felony; and by adding new language to AS 11/51.210; specifically (c) Criminal nonsupport of a vulnerable adult is a class A misdemeanor.

The number of arrests, convictions by the Department of Law, and the length of any jail sentence that a court might impose for either of these types of offenses is unknown at this time. For this reason no costs have been shown in the fiscal note.

Prepared by: Joe Reeves
 Division: Office of the Commissioner
 Approved by Commissioner: *Margaret de la Riva*
 Agency: Department of Corrections

Phone: 465-4652
 Date: 3/1/96
 Date: 3/1/96

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FISCAL NOTE

No. 1

Bill Version: CS SB 211 (STA)

(S) Publish Date: 3/11/96

**STATE OF ALASKA
1996 LEGISLATIVE SESSION**

Revision Date: _____ Dept. Affected: Administration
 Title: An Act relating to sexual assault; and relating BRU: Senior Services
to endangering the welfare of vulnerable adults... Component: Protection, Community Services
 Sponsor: Ellis & Administration
 Requestor: _____ COMPONENT SERIAL NO. 2083

Expenditures/Revenues	(Thousands of Dollars)					
OPERATING EXPENDITURE	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ()						

FUND SOURCE	(Thousands of Dollars)					
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
Total	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of current year (FY 96) cost: \$ _____

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill will have no fiscal impact on this division.

Prepared by: Connie J. Sipe, Director *(Signature)*
 Division: Senior Services

Phone: 563-5654
 Date: _____

Approved by Commissioner: Mark Boyer *(Signature)*
 Agency: Department of Administration

Date: 3/7/96

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(907) 479-2569

COORDINATOR
Capital City Task Force
Rupert Andrews
9415 Long Run Drive
Juneau, AK 99801
(907) 789-7422

March 20, 1996

Senator Robin Taylor
Chair, Senate Judiciary Committee
Alaska State Legislature
Nineteenth Legislature- Second Session

Dear Senator Taylor:

The American Association of Retired Persons (AARP) in Alaska support Senate Bill 211, an act that if adopted by the Legislature, would increase the protection of vulnerable adults in Alaska. AARP has a long record of research into the problem of abuse of vulnerable adults. I am attaching a copy of AARP findings and model legislation to assist your committee and individual legislators in understanding this problem and what might be accomplished legislatively in Alaska to bring it under control.

If there are any questions or further information that the Judiciary Committee might require I can be contacted at (907) 789-7422 or FAX (907) 789-1846.

We hope the attached material proves helpful in your deliberations.

Sincerely,

Rupe Andrews, CCTF Cordinator, AARP

Elder Abuse

- AARP Policy
- South Carolina Omnibus Adult Protection Act
- *Elder Abuse and Neglect*
- Elder Abuse: The National Perspective
- "Elder Abuse: A Family Tragedy"
- "Fighting against Financial Exploiters"
- The Elder Abuse and Dependent Adult Civil Protection Act

AARP Policy on Elder Abuse

Federal

Elder abuse, like many other forms of domestic violence, is a hidden phenomenon affecting hundreds of thousands of older Americans. Elder abuse occurs everywhere, regardless of race, religion, income, education, place of residence, or living arrangement. Because abuse is not always reported, information on who is likely to suffer a particular type of abuse is not available. We do know that physical abuse is more likely from a spouse, adult child, or other family member.

Experts on elder abuse generally believe that increasing the level of awareness among the general public and among professionals is the most effective means of encouraging people to recognize and report cases of elder abuse (see Figure 11-1). A 1991 report prepared by the Government Accounting Office showed that the 40 state agency officials interviewed believed that the most effective factor in preventing and treating abuse of the frail elderly is in-home services such as meals-on-wheels or home health care. Many jurisdictions have services to assist victims of domestic violence, especially female victims. Such services can provide victims with valuable information about legal and other strategies for preventing further abuse.

The American Medical Association estimates that one out of every four elderly persons experiences abuse or neglect. Elder abuse can be physical, financial, or psychological and may take place in a home or institutional setting. Elder abuse can also be systemic, when guardianship procedures intended to protect the infirm, ill, or incompetent are used to deprive older persons of their rights or resources. Guardianship infringes on the right of the individual to make his or her own decisions on where and how to live, and when to seek medical attention, among other decisions affecting self-determination. Differing state laws may also result in a person being deemed competent in one state, but unable to gain control of his or her assets in another state where the guardianship laws may be more restrictive.

ASSOCIATION POSITION:

AARP supports federal legislation that would encourage the states to make a criminal offense the abuse, exploitation, or intentional neglect by any person, who by law, contract, court order, or voluntary action is charged with or has assumed responsibility for the food, clothing, or shelter needs of an elderly individual. In addition, states should make institutions liable for criminal and civil penalties for victimization of those in their care. The Department of Health and Human Services should work toward uniform definitions of abuse and neglect among the states.

The Association supports a strong federal effort to assist state and local agencies in preventing, treating and prosecuting all forms of elder abuse, including spousal abuse. This effort should include research on the causes and frequency of abuse, demonstration projects on treatment and intervention to assist both abuser and abused, and financial and technical assistance to states. Funding for Social Services Block Grant and Older Americans Act programs that deal with abuse must continue and increase as the number of extremely elderly persons increases.

The federal government must encourage the expansion of programs that provide alternative protective arrangements that are less restrictive than guardianship, and educational and support programs to assist guardians, particularly those who are family members, in carrying out their responsibilities. It can accomplish this by coordinating programs funded under Social Services Block grants and the Older Americans Act and state and local programs, both public and private, such as Legal Assistance to the Elderly, representative payees, and volunteer monitoring, visitor, and auditor programs.

State

In the area of elder abuse, states should:

- 1. Enact laws that make it a criminal offense with enhanced penalties to abuse, neglect and/or exploit a vulnerable older person.**
- 2. Enact laws that provide victims and their legal representatives adequate civil remedies (including the award of attorney fees and**

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION



Rev. 6/98

Central Microfilm Services
Department of Education
State of Alaska

AARP Policy on Elder Abuse

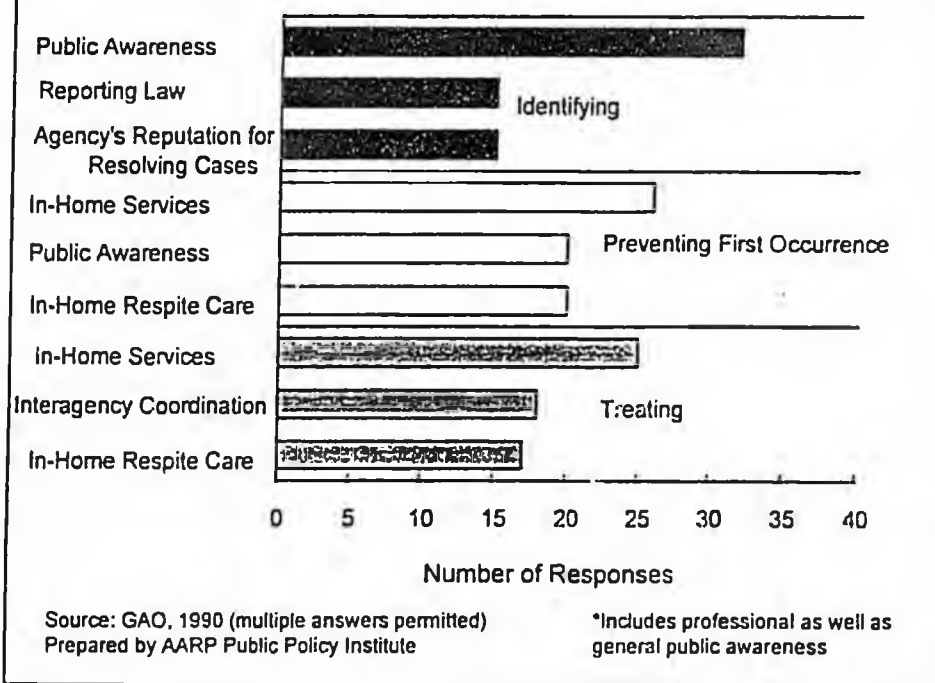
Federal

Elder abuse, like many other forms of domestic violence, is a hidden phenomenon affecting hundreds of thousands of older Americans. Elder abuse occurs everywhere, regardless of race, religion, income, education, place of residence, or living arrangement. Because abuse is not always reported, information on who is likely to suffer a particular type of abuse is not available. We do know that physical abuse is more likely from a spouse, adult child, or other family member.

Experts on elder abuse generally believe that increasing the level of awareness among the general public and among professionals is the most effective means of encouraging people to recognize and report cases of elder abuse (see Figure 11-1). A 1991 report prepared by the Government Accounting Office showed that the 40 state agency officials interviewed believed that the most effective factor in preventing and treating abuse of the frail elderly is in-home services such as meals-on-wheels or home health care. Many jurisdictions have services to assist victims of domestic violence, especially female victims. Such services can provide victims with valuable information about legal and other strategies for preventing further abuse.

The American Medical Association estimates that one out of every four elderly persons experiences abuse or neglect. Elder abuse can be physical, financial, or psychological and may take place in a home or institutional setting. Elder abuse can also be systemic, when guardianship procedures intended to protect the infirm, ill, or incompetent are used to deprive older persons of their rights or resources. Guardianship infringes on the right of the individual to make his or her own decisions on where and how to live, and when to seek medical attention, among other decisions affecting self-determination. Differing state laws may also result in a person being deemed competent in one state, but unable to gain control of his or her assets in another state where the guardianship laws may be more restrictive.

Figure 11-1
**Factors Rated Most Effective in Identifying,
 Preventing & Treating Elder Abuse**
Top 3 in Each Area, as Rated by 40 State Agency Officials



The rapid increase in the number of older persons needing care will require the development and improvement of a variety of protective services, ranging from simple household chore services to money management, conservatorships, and guardianships. Community-based programs provide services for both intervention and prevention, such as counseling, information and referral, and personal money management. However, the percentage of total state adult protective services budgets allocated to elderly protective services remains disproportionately low.

More federal support, through commitment of financial resources, better coordination of existing services, and the strengthening of safeguards, will be necessary to establish a comprehensive response and delivery system.

ASSOCIATION POSITION:

AARP supports federal legislation that would encourage the states to make a criminal offense the abuse, exploitation, or intentional neglect by any person, who by law, contract, court order, or voluntary action is charged with or has assumed responsibility for the food, clothing, or shelter needs of an elderly individual. In addition, states should make institutions liable for criminal and civil penalties for victimization of those in their care. The Department of Health and Human Services should work toward uniform definitions of abuse and neglect among the states.

The Association supports a strong federal effort to assist state and local agencies in preventing, treating and prosecuting all forms of elder abuse, including spousal abuse. This effort should include research on the causes and frequency of abuse, demonstration projects on treatment and intervention to assist both abuser and abused, and financial and technical assistance to states. Funding for Social Services Block Grant and Older Americans Act programs that deal with abuse must continue and increase as the number of extremely elderly persons increases.

The federal government must encourage the expansion of programs that provide alternative protective arrangements that are less restrictive than guardianship, and educational and support programs to assist guardians, particularly those who are family members, in carrying out their responsibilities. It can accomplish this by coordinating programs funded under Social Services Block grants and the Older Americans Act and state and local programs, both public and private, such as Legal Assistance to the Elderly, representative payees, and volunteer monitoring, visitor, and auditor programs.

State

In the area of elder abuse, states should:

1. Enact laws that make it a criminal offense with enhanced penalties to abuse, neglect and/or exploit a vulnerable older person.
2. Enact laws that provide victims and their legal representatives adequate civil remedies (including the award of attorney fees and

costs, expedited hearings, and post-mortem recoveries for pain and suffering) against alleged perpetrators of abuse, neglect, and exploitation. In civil cases brought under elder abuse laws, if the victims are able to prove that they meet the statutory definition of a vulnerable adult, then the burden of proof shall shift to the alleged perpetrators to show they did not commit the abuse, neglect and/or exploitation.

3. Establish programs to help family members and caregivers who are abusers correct their abusive behavior.
4. Enact and enforce adult protective services laws that provide for investigation, access, and intervention in emergency and non-emergency situations of abuse, neglect, and exploitation of vulnerable individuals in the community and long-term care facilities. These laws must balance the individual's autonomy and self-determination with the need for the state to protect those people who cannot protect themselves. Any protective action that is taken shall be the least restrictive while meeting the specific needs of the vulnerable individual.
5. Develop public awareness programs, promote interagency coordination, and expand in-home services, including respite care, as a means of identifying cases of elder abuse and preventing or treating its occurrence.
6. Establish mechanisms for assessing the incidence of spouse/partner abuse among older couples, and work to assure that domestic violence and adult protective services agencies within the state make their programs more responsive to the needs of older abused spouses.

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A BILL

10

11 TO AMEND TITLE 43, CODE OF LAWS OF SOUTH CAROLINA,
12 1976, BY ADDING CHAPTER 35 SO AS TO ENACT THE
13 OMNIBUS ADULT PROTECTION ACT; TO DEFINE TERMS; TO
14 PROVIDE FOR THE DUTIES OF THE STATE DEPARTMENT OF
15 SOCIAL SERVICES AND THE DIVISION OF OMBUDSMAN AND
16 CITIZEN SERVICES, OFFICE OF THE GOVERNOR, RELATIVE
17 TO ADULT ABUSE, NEGLECT, AND EXPLOITATION; TO
18 DESIGNATE THOSE REQUIRED TO REPORT; TO ESTABLISH
19 REPORTING AND INVESTIGATING PROCEDURES; TO PROVIDE
20 FAMILY COURT PROCEDURES; TO ABROGATE THE
21 HUSBAND-WIFE AND DOCTOR-PATIENT PRIVILEGE IN ADULT
22 ABUSE CASES; TO PROVIDE FOR EMERGENCY REMOVAL OF AN
23 ADULT; TO PROVIDE IMMUNITY FOR GOOD FAITH
24 REPORTING; TO PROVIDE CIVIL AND CRIMINAL PENALTIES;
25 TO CREATE THE ADULT PROTECTION COORDINATING COUNCIL
26 AND TO PROVIDE FOR ITS MEMBERSHIP AND DUTIES; TO
27 AMEND SECTION 8-17-340, RELATING TO THE STATE
28 EMPLOYEE GRIEVANCE COMMITTEE, SO AS TO REVISE THE
29 STANDARD FOR REVIEWING A CASE INVOLVING ABUSE,
30 NEGLECT, OR EXPLOITATION; TO AMEND SECTION 16-1-10,
31 AS AMENDED, RELATING TO CRIMES CLASSIFIED AS
32 FELONIES, SO AS TO INCLUDE THE OFFENSES ADDED BY
33 THIS ACT; AND TO REPEAL SECTION 23-1-220 AND
34 CHAPTERS 29 AND 30 OF TITLE 43.

35

36 Whereas, the General Assembly finds it necessary:
37 (1) to provide a system of adult protection
38 in South Carolina;
39 (2) to clarify the roles and responsibilities
40 of agencies involved in the system;
41 (3) to provide a mechanism for problem
42 resolution and interagency coordination;
43 (4) to address continuing needs of vulnerable
44 adults;

- 1 (5) to uniformly define abuse, neglect, and
2 exploitation for vulnerable adults in all settings;
3 (6) to clarify reporting procedures for
4 allegations of abuse, neglect, and exploitation;
5 (7) to provide procedures for emergency
6 protective custody;
7 (8) to define the role of the court in the
8 adult protection system;
9 (9) to provide civil and criminal penalties
10 for abuse, neglect, and exploitation;
11 (10) to provide services in the least
12 restrictive setting possible. Now, therefore,
13

14 Be it enacted by the General Assembly of the State
15 of South Carolina:

16
17 SECTION 1. The 1976 Code is amended by adding:

18
19 "CHAPTER 35

20
21 Adult Protection

22
23 Article 1

24
25 Duties and Procedures
26 of
27 Investigative Entities
28

29 Section 43-35-5. This chapter may be cited as
30 the Omnibus Adult Protection Act.

31
32 Section 43-35-10. As used in this chapter:

33 (1) 'Abuse' means physical abuse or
34 psychological abuse.

35 (2) 'Caregiver' means a person who provides
36 care to a vulnerable adult, with or without
37 compensation, on a temporary or permanent or full
38 or part-time basis and includes, but is not limited
39 to, a relative, household member, day care
40 personnel, adult foster home sponsor, and personnel
41 of a public or private institution or facility.

42 (3) 'Exploitation' means:

43 (a) causing or requiring a vulnerable adult
44 to engage in activity or labor which is improper,

1 illegal, or against the wishes of the vulnerable
2 adult. Exploitation does not include requiring a
3 vulnerable adult to participate in an activity or
4 labor which is a part of a written plan of care; or
5 (b) an improper, illegal, or unauthorized use
6 of the funds, assets, property, power of attorney,
7 guardianship, or conservatorship of a vulnerable
8 adult by a person for the profit or advantage of
9 that person or another person.

10 (4) 'Facility' means a nursing care facility,
11 community residential care facility, a psychiatric
12 hospital, or a facility operated or contracted for
13 operation by the State Department of Mental Health
14 or the South Carolina Department of Mental
15 Retardation.

16 (5) 'Investigative entity' means the Division
17 of Ombudsman and Citizens Services, Office of the
18 Governor, or the State Department of Social
19 Services.

20 (6) 'Neglect' means the failure or omission
21 of a caregiver to provide the care, goods, or
22 services necessary to maintain the health or safety
23 of a vulnerable adult, including, but not limited
24 to, food, clothing, medicine, shelter, supervision,
25 and medical services. Neglect may be repeated
26 conduct or a single incident which has produced or
27 is likely to result in serious physical or
28 psychological harm or substantial risk of death.
29 Noncompliance with regulatory standards alone does
30 not constitute neglect. Neglect includes the
31 inability of a vulnerable adult, in the absence of
32 a caretaker, to provide for his or her own health
33 or safety which produces or could reasonably be
34 expected to produce serious physical or
35 psychological harm or substantial risk of death.

36 (7) 'Occupational licensing board' means a
37 health professional licensing board which is a
38 state agency that licenses and regulates health
39 care providers and includes, but is not limited to,
40 the State Board of Examiners for Nursing Home
41 Administrators and Community Residential Care
42 Facility Administrators, State Board of Nursing for
43 South Carolina, State Board of Medical Examiners,
44 State Board of Social Work Examiners, and the State

1 Board of Dentistry.

2 (8) 'Physical abuse' means intentionally
3 inflicting or allowing to be inflicted physical
4 injury on a vulnerable adult by an act or failure
5 to act. Physical abuse includes, but is not
6 limited to, slapping, hitting, kicking, biting,
7 choking, pinching, burning, actual or attempted
8 sexual battery as defined in Section 16-3-651,
9 overmedication for the purpose of controlling
10 behavior, and unreasonable confinement. Physical
11 abuse also includes the use of a restrictive or
12 physically intrusive procedure to control behavior
13 for the purpose of punishment except that a
14 therapeutic procedure prescribed by a licensed
15 physician or other qualified professional is not
16 considered physical abuse if it is part of a
17 written plan of care. Physical abuse does not
18 include altercations or acts of assault between
19 vulnerable adults.

20 (9) 'Protective services' means those services
21 whose objective is to protect a vulnerable adult
22 from harm caused by the vulnerable adult or
23 another. These services include, but are not
24 limited to, evaluating the need for protective
25 services, securing and coordinating existing
26 services, arranging for living quarters, obtaining
27 financial benefits to which a vulnerable adult is
28 entitled, and securing medical services, supplies,
29 and legal services.

30 (10) 'Psychological abuse' means deliberately
31 subjecting a vulnerable adult to threats or
32 harassment or other forms of intimidating behavior
33 causing fear, humiliation, degradation, agitation,
34 confusion, or other forms of serious emotional
35 distress.

36 (11) 'Vulnerable adult' means a person
37 eighteen years of age or older who has a physical
38 or mental condition which substantially impairs the
39 person from adequately providing for his or her
40 own care or protection. This includes a person who
41 is impaired in the ability to adequately provide
42 for the person's own care or protection because of
43 the infirmities of aging, including, but not
44 limited to, organic brain damage, advanced age, and

1 physical, mental, or emotional dysfunction.

2

3 Section 43-35-15. (A) The Division of
4 Ombudsman and Citizen Services, Office of the
5 Governor, shall investigate or cause to be
6 investigated reports of alleged abuse, neglect, and
7 exploitation of vulnerable adults occurring in
8 facilities. The Ombudsman may develop policies,
9 procedures, and memoranda of agreement to be used
10 in reporting these incidents and in furthering its
11 investigations.

12 (B) The State Department of Social Services
13 shall investigate or cause to be investigated
14 reports of alleged abuse, neglect, and exploitation
15 of vulnerable adults occurring in all settings
16 other than facilities and where appropriate,
17 provide protective services. The department may
18 promulgate regulations and develop policies,
19 procedures, and memoranda of agreement to be used
20 in reporting these incidents, in furthering its
21 investigations, and in providing protective
22 services.

23

24 Section 43-35-20. In addition to all other
25 powers and duties that an investigative entity is
26 given in this article, the investigative entity
27 may:

28 (1) have access to facilities for the purpose of
29 conducting investigations;

30 (2) request and receive written statements,
31 documents, exhibits, and other items pertinent to
32 an investigation, including, but not limited to,
33 hospital records of a vulnerable adult which the
34 hospital is authorized to release upon written
35 request of the investigative entity without
36 obtaining patient authorization;

37 (3) issue administrative subpoenas for the
38 purpose of gathering information and documents;

39 (4) institute proceedings in a court of
40 competent jurisdiction to seek relief necessary to
41 carry out the provisions of this chapter;

42 (5) require all persons, including family
43 members of a vulnerable adult and facility staff
44 members, to cooperate with the investigative entity

1 in carrying out its duties under this chapter,
2 including, but not limited to, conducting
3 investigations and providing protective services;
4 (6) require all officials, agencies,
5 departments, and political subdivisions of the
6 State to assist and cooperate within their
7 jurisdictional power with the court and the
8 investigative entity in furthering the purposes of
9 this chapter;

10 (7) conduct studies and compile data regarding
11 abuse, neglect, and exploitation;

12 (8) issue reports and recommendations.
13

14 Section 43-35-25. (A) A physician, nurse,
15 dentist, optometrist, medical examiner, coroner,
16 other medical, mental health or allied health
17 professional, Christian Science practitioner,
18 religious healer, school teacher, counselor,
19 psychologist, mental health or mental retardation
20 specialist, social or public assistance worker,
21 caregiver, staff or volunteer of an adult day care
22 center or of a facility, or law enforcement officer
23 having reason to believe that a vulnerable adult
24 has been or is likely to be abused, neglected, or
25 exploited shall report the incident in accordance
26 with this section. Any other person who has actual
27 knowledge that a vulnerable adult has been abused,
28 neglected, or exploited shall report the incident
29 in accordance with this section.

30 (B) Except as provided in subsection (A), any
31 other person who has reason to believe that a
32 vulnerable adult has been or may be abused,
33 neglected, or exploited may report the incident.

34 (C) A person required to report pursuant to this
35 section is personally responsible for making the
36 report; however, a state agency may make a report
37 on behalf of an agency employee if the procedure
38 the agency uses for reporting has been approved by
39 the investigative entity to which the report is to
40 be made.

41 (D) A person required to report under this
42 section must report the incident within twenty-four
43 hours or the next business day. A report must be
44 made in writing or orally by telephone or otherwise

1 to the Ombudsman of the Office of the Governor for
2 incidents occurring in facilities and to the State
3 Department of Social Services for incidents
4 occurring in all other settings. In the event an
5 investigative entity receives a report which is not
6 within its investigative jurisdiction, it shall
7 forward the report to the appropriate entity not
8 later than the next business day.

9 (E) No facility may develop policies or
10 procedures that interfere with the reporting
11 requirements of this section.

12 (F) Provided the mandatory reporting
13 requirements of this section are met, nothing in
14 this section precludes a person from also reporting
15 directly to law enforcement, and in cases of an
16 emergency, law enforcement must also be
17 contacted.

18
19 Section 43-35-30. A person required to report
20 pursuant to this article or a person investigating
21 a report may take or cause to be taken color
22 photographs of the trauma visible on the vulnerable
23 adult who is the subject of a report. A person
24 required to report under this chapter as a member
25 of the staff of a medical facility, public or
26 private institution, school, facility, or agency
27 immediately shall notify the person in charge or
28 the designated agent of the person in charge who
29 shall take or cause to be taken color photographs
30 of visible trauma. The investigative entity or law
31 enforcement, if indicated, may cause to be
32 performed a radiological examination or medical
33 examination of the vulnerable adult without
34 consent. All photographs, x-rays, and results of
35 medical examinations and tests must be provided to
36 law enforcement or to the investigative entity upon
37 request.

38
39 Section 43-35-35. A person required to report
40 or investigate cases under this chapter who has
41 probable cause to believe that a vulnerable adult
42 died as a result of abuse or neglect shall report
43 the death and suspected cause of death to the
44 coroner or medical examiner. The coroner or

1 medical examiner shall conduct an investigation and
2 may conduct or order an autopsy. The coroner or
3 medical examiner must report the investigative
4 findings to law enforcement and the circuit
5 solicitor in the appropriate jurisdiction.

6
7 Section 43-35-40. Upon receiving a report the
8 investigative entity promptly shall initiate an
9 investigation and within two business days of
10 receiving the report must review the report for the
11 purpose of reporting to law enforcement those cases
12 requiring involvement of law enforcement. A report
13 to law enforcement must be made within one business
14 day of completing the review. The law enforcement
15 agency shall initiate an incident report and
16 provide upon request a copy to an entity conducting
17 an investigation pursuant to this chapter or any
18 other provision of state or federal law.

19
20 Section 43-35-45. (A) In investigating a
21 report if consent cannot be obtained for access to
22 the vulnerable adult or the premises, the
23 investigative entity may seek a warrant from the
24 family court to enter and inspect and photograph
25 the premises and the condition of the vulnerable
26 adult. The court shall issue a warrant upon a
27 showing of probable cause that the vulnerable adult
28 has been abused, neglected, or exploited or is at
29 risk of abuse, neglect, or exploitation.

30 (B) At any time during or subsequent to an
31 investigation where a vulnerable adult is at
32 substantial risk to be or has been abused,
33 neglected, or exploited and consent to provide
34 services cannot be obtained, the Department of
35 Social Services may petition the family court for
36 an order to provide protective services. In those
37 cases requiring emergency protective services or
38 emergency removal of the vulnerable adult from the
39 place the adult is located or residing, the
40 department may seek ex parte relief. The court may
41 expedite the ex parte proceeding to any extent
42 necessary to protect the vulnerable adult. The
43 family court may order ex parte that the vulnerable
44 adult be taken into emergency protective custody

1 without the consent of the vulnerable adult or the
2 guardian or others exercising temporary or
3 permanent control over the vulnerable adult, if the
4 court determines there is probable cause to believe
5 that by reason of abuse or neglect there exists an
6 imminent danger to the vulnerable adult's life or
7 physical safety. The court also may order
8 emergency services or other relief as necessary to
9 protect the vulnerable adult.

10 (C) Within ten days following the filing of a
11 petition pursuant to this section the court must
12 appoint a guardian ad litem and an attorney for the
13 vulnerable adult; and within forty days of the
14 petition being filed the court shall hold a hearing
15 on the merits.

16 (D) Before the hearing on the merits the
17 Department of Social Services must conduct a
18 comprehensive evaluation of the vulnerable adult.
19 The evaluation must include, but is not limited to:

20 (1) the vulnerable adult's current address
21 and with whom the vulnerable adult is residing;

22 (2) a list of all persons or agencies
23 currently providing services to the vulnerable
24 adult and the nature of these services;

25 (3) a summary of services, if any, provided
26 to the vulnerable adult by the Department of Social
27 Services;

28 (4) if needed, a medical, psychological,
29 social, vocational, or educational evaluation;

30 (5) recommendations for protective services
31 which would serve the best interests of the
32 vulnerable adult; however, when these services are
33 to be provided by another state agency, these
34 recommendations must be developed in consultation
35 with the other agency.

36 A copy of the evaluation must be provided to the
37 court, the guardian ad litem, and the attorney at
38 least five working days before the hearing on the
39 merits. Reasonable expenses incurred for
40 evaluations required by this subsection must be
41 paid by the Department of Social Services which
42 must seek reimbursement for these evaluations,
43 where possible.

44 (E) At the hearing on the merits, the court may

1 order the department to provide protective services
2 if it finds that:

3 (1) the vulnerable adult is at substantial
4 risk of being or has been abused, neglected, or
5 exploited and the vulnerable adult is unable to
6 protect herself or himself; and

7 (2) protective services are necessary to
8 protect the vulnerable adult from the substantial
9 risk of or from abuse, neglect, or exploitation.

10 (F) Protective services ordered pursuant to this
11 section must be provided in the least restrictive
12 setting available and appropriate for the
13 vulnerable adult and noninstitutional placement
14 must be used whenever possible. Subsequently, if
15 commitment to a treatment facility is required, the
16 Department of Social Services may initiate
17 commitment proceedings.

18 (G) Any interested person, on behalf of the
19 vulnerable adult, may file a motion for review of
20 the court order issued pursuant to this section.

21 (H) Following a court order from the merits
22 hearing to provide protective services to a
23 vulnerable adult, the Department of Social
24 Services, at least every six months, must evaluate
25 the vulnerable adult and submit a written report to
26 the court, and any other parties required by the
27 court, regarding the vulnerable adult's need for
28 continued protective services as defined in this
29 chapter.

30 (I) If the court determines that the vulnerable
31 adult is financially capable of paying for services
32 ordered pursuant to this section, then payment by
33 or from the financial resources of the vulnerable
34 adult may be ordered.

35 (J) In an action for exploitation or in which
36 payment for protective services is in issue, upon
37 its own motion or a motion of any party, the court
38 may order that the vulnerable adult's financial
39 records be made available on a certain day and time
40 for inspection by the parties.

41 (K) Expenses incurred by the Department of
42 Social Services on behalf of a vulnerable adult
43 that have not been reimbursed at the time of the
44 vulnerable adult's death become a claim against the

1 estate of the vulnerable adult.

2 (L) Payments for which a vulnerable adult is
3 responsible or for which the Department of Social
4 Services is to be reimbursed only include payments
5 to third parties and do not include personnel or
6 operating expenses of the Department of Social
7 Services.

8
9 Section 43-35-50. The privileged quality of
10 communication between husband and wife or between
11 a professional person and the person's patient or
12 client, except that between attorney and client or
13 priest and penitent, are abrogated and do not
14 constitute grounds for failing to report or for the
15 exclusion of evidence in any civil or criminal
16 proceeding resulting from a report made pursuant to
17 this chapter.

18
19 Section 43-35-55. (A) A law enforcement
20 officer may take a vulnerable adult in a
21 life-threatening situation into protective custody
22 if:

23 (1) there is probable cause to believe that
24 by reason of abuse, neglect, or exploitation there
25 exists an imminent danger to the vulnerable adult's
26 life or physical safety;

27 (2) the vulnerable adult or caregiver does
28 not consent to protective custody; and

29 (3) there is not time to apply for a court
30 order.

31 (B) When a law enforcement officer takes
32 protective custody of a vulnerable adult, the
33 officer must transport the vulnerable adult to a
34 place of safety which must not be a facility for
35 the detention of criminal offenders or of persons
36 accused of crimes. The Department of Social
37 Services has custody of the vulnerable adult
38 pending the family court hearing to determine if
39 there is probable cause for protective custody.

40 (C) A vulnerable adult who is taken into
41 protective custody by a law enforcement officer,
42 may not be considered to have been arrested.

43 (D) When a law enforcement officer takes
44 protective custody of a vulnerable adult under this

1 section, the law enforcement officer must
2 immediately notify the county Department of Social
3 Services and the circuit solicitor of the county
4 where the vulnerable adult was situated at the time
5 of being taken into protective custody. This
6 notification must be made in writing or orally by
7 telephone or otherwise and must include the
8 following information:

9 (1) the name of the vulnerable adult, if
10 known, or a physical description of the adult, if
11 the name is unknown;

12 (2) the address of the place from which the
13 vulnerable adult was removed by the officer;

14 (3) the name and the address, if known, of
15 any person who was exercising temporary or
16 permanent custody of or control over or who was the
17 caregiver of the vulnerable adult at the time the
18 adult was taken into protective custody;

19 (4) the address of the place to which the
20 vulnerable adult was transported by the officer;

21 (5) a description of the facts and
22 circumstances resulting in the officer taking the
23 vulnerable adult into protective custody.

24 (E) The solicitor is responsible for filing a
25 petition for protective custody within one business
26 day of receiving the notification required by
27 subsection (D).

28 (F) The family court shall hold a hearing to
29 determine whether there is probable cause for the
30 protective custody within seventy-two hours of the
31 solicitor filing the petition, excluding Saturdays,
32 Sundays, and legal holidays.

33 (G) Upon receiving notification that a
34 vulnerable adult has been taken into protective
35 custody the Department of Social Services shall
36 commence an investigation. After the hearing
37 required by subsection (F), the department may
38 initiate or cause to be initiated a petition for
39 services pursuant to Section 43-35-45.

40
41 Section 43-35-60. Unless otherwise prohibited
42 by law, a state agency, an investigative entity,
43 and law enforcement may share information related
44 to an investigation conducted as a result of a

1 report made under this chapter. Information in
2 these investigative records must not be disclosed
3 publicly.

4
5 Section 43-35-65. A facility as defined in
6 Section 43-35-10 shall prominently display notices
7 stating the duties of its personnel under this
8 chapter, the text of which must be provided by the
9 Division of Ombudsman and Citizens Services, Office
10 of the Governor. The notices must also include the
11 addresses and telephone numbers of the Ombudsman
12 and local law enforcement.

13
14 Section 43-35-70. The investigative entity may
15 report an incident of abuse, neglect, or
16 exploitation alleged against a health care
17 professional to the occupational licensing board by
18 whom that person is licensed.

19
20 Section 43-35-75. (A) A person who, acting in
21 good faith, reports pursuant to this chapter or who
22 participates in an investigation or judicial
23 proceeding resulting from a report is immune from
24 civil and criminal liability which may otherwise
25 result by reason of this action. In a civil or
26 criminal proceeding good faith is a rebuttable
27 presumption.

28 (B) A person who, acting in good faith, makes a
29 report or who cooperates with an investigation
30 conducted pursuant to this chapter has a cause of
31 action for compensatory damages against a person
32 who caused a detrimental change in the employment
33 status of the reporting or cooperating person.

34
35 Section 43-35-80. (A) Notwithstanding any
36 regulatory or administrative penalty that may be
37 assessed and in addition to a private civil cause
38 of action that may be brought against a person or
39 facility based on an action or failure to act that
40 otherwise constitutes abuse, neglect, or
41 exploitation under this chapter, the Attorney
42 General, upon referral from the Division of
43 Ombudsman and Citizens Services, Office of the
44 Governor, may bring an action against a person who

1 fails through pattern or practice to exercise
2 reasonable care in hiring, training, or supervising
3 facility personnel or in staffing or operating a
4 facility and this failure results in the commission
5 of abuse, neglect, exploitation, or any other crime
6 against a vulnerable adult in a facility.

7 (B) In granting relief under this section, the
8 court may assess a civil fine of not less than ten
9 thousand dollars or order injunctive relief, or
10 both, and may order other relief as the court
11 considers appropriate.

12 (C) Nothing in this section may be construed to
13 create a private cause of action against one who
14 fails through pattern or practice to exercise
15 reasonable care as provided for in subsection (A).

16 (D) For the purposes of this section 'person'
17 means any natural person, corporation, joint
18 venture, partnership, unincorporated association,
19 governmental entity, or other business entity.

20 (E) To the extent fines collected pursuant to
21 this section exceed the cost of litigation, these
22 fines must be credited to the South Carolina
23 Department of Social Services Adult Protective
24 Services Emergency Fund and may be carried forward
25 from one fiscal year to the next.

26
27 Section 43-35-85. (A) A person required to
28 report under this chapter and who knowingly and
29 wilfully fails to do so is guilty of a misdemeanor
30 and, upon conviction, must be fined not more than
31 five thousand dollars or imprisoned not more than
32 five years.

33 (B) A person who knowingly and wilfully abuses
34 a vulnerable adult is guilty of a felony and, upon
35 conviction, must be imprisoned not more than ten
36 years.

37 (C) A person who knowingly and wilfully neglects
38 a vulnerable adult is guilty of a felony and, upon
39 conviction, must be imprisoned not more than ten
40 years.

41 (D) A person who knowingly and wilfully exploits
42 a vulnerable adult is guilty of a felony and, upon
43 conviction, must be fined not more than five
44 thousand dollars or imprisoned not more than ten

1 years, or both, and may be required by the court to
2 make restitution.

3 (E) A person who threatens, intimidates, or
4 attempts to intimidate a vulnerable adult subject
5 of a report, a witness, or any other person
6 cooperating with an investigation conducted
7 pursuant to this chapter is guilty of a misdemeanor
8 and, upon conviction, must be fined not more than
9 five thousand dollars or imprisoned for not more
10 than five years.

11 (F) A person who wilfully and knowingly
12 obstructs or in any way impedes an investigation
13 conducted pursuant to this chapter, upon
14 conviction, is guilty of a misdemeanor and must be
15 fined not more than five thousand dollars or
16 imprisoned for not more than five years.

17
18 Section 43-35-90. This article is not intended
19 to affect in any way the authority of any agency to
20 act under state or federal law.

21

22

23

Article 3

24

25

Adult Protection Coordinating Council

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Section 43-35-310. (A) There is created the
Adult Protection Coordinating Council under the
auspices of the State Health and Human Services
Finance Commission and is comprised of:

(1) one member from the institutional care
service provision system or a family member of a
consumer of that system and one member from the
home and community-based service provision system
or a family member of a consumer of that system,
both of whom must be appointed by the Governor for
terms of two years; and

(2) these members who shall serve ex officio:

(a) Attorney General or a designee;

(b) Board of Examiners for Nursing Home
Administrators and Community Residential Care
Facility Administrators, Executive Director or a
designee;

(c) State Board of Nursing for South

1 Carolina, Executive Director or a designee;
2 (d) Commission on Aging, Executive Director
3 or a designee;
4 (e) Criminal Justice Academy, Executive
5 Director or a designee;
6 (f) South Carolina Department of Health and
7 Environmental Control, Commissioner or a designee;
8 (g) State Department of Mental Health,
9 Commissioner or a designee;
10 (h) South Carolina Department of Mental
11 Retardation, Commissioner or a designee;
12 (i) State Department of Social Services,
13 Commissioner or a designee;
14 (j) Health and Human Services Finance
15 Commission, Executive Director or a designee;
16 (k) Joint Legislative Committee on Aging,
17 Chair or a designee;
18 (l) Police Chiefs' Association, President
19 or a designee;
20 (m) Prosecution Coordination Commission,
21 Executive Director or a designee;
22 (n) South Carolina Protection and Advocacy
23 System for the Handicapped, Inc., Executive
24 Director or a designee;
25 (o) South Carolina Sheriff's Association,
26 Executive Director or a designee;
27 (p) South Carolina Law Enforcement
28 Division, Chief or a designee;
29 (q) State Ombudsman of the Office of the
30 Governor or a designee.
31 (B) Vacancies on the council must be filled in
32 the same manner as the initial appointment.
33

34 Section 44-35-320. The Adult Protection
35 Coordinating Council shall coordinate the planning
36 and implementation efforts of the entities involved
37 in the adult protection system. Members shall
38 facilitate problem resolution and develop action
39 plans to overcome problems identified within the
40 system. The council shall develop methods of
41 addressing the ongoing needs of vulnerable adults,
42 including increasing public awareness of adult
43 abuse, neglect, and exploitation. The council
44 shall remain abreast of new trends in adult

1 protection from national clearinghouses and other
2 appropriate entities. The Adult Protection
3 Coordinating Council has no authority to direct or
4 require implementing action from any member or
5 entity.

6
7 Section 44-35-330. (A) Duties of the council
8 are to:

9 (1) provide oversight in adult protection
10 and to recommend changes in the system;

11 (2) identify and promote training on
12 critical issues in adult protection;

13 (3) facilitate arrangements for continuing
14 education seminars and credits, when appropriate;

15 (4) coordinate agency training when
16 possible to avoid duplication;

17 (5) coordinate data collection and conduct
18 analyses including periodic monitoring and
19 evaluation of the incidence and prevalence of adult
20 abuse, neglect, and exploitation;

21 (6) determine and target problem areas for
22 training based on the analysis of the data;

23 (7) promote resource development;

24 (8) assist with problem resolution and
25 facilitate interagency coordination of efforts;

26 (9) promote and enhance public awareness;

27 (10) promote prevention and intervention
28 activities to ensure quality of care for vulnerable
29 adults and their families;

30 (11) provide technical assistance for
31 developing memoranda of agreement among involved
32 entities;

33 (12) promote coordination and communication
34 among groups and associations which may be affected
35 by the Adult Protection Coordinating Council's
36 actions through the use of memoranda of agreement.

37 (B) Duties of the council are subject to the
38 appropriation of funding and allocation of
39 personnel sufficient to carry out the functions of
40 the council.

41
42 Section 44-35-340. The chair of the council must
43 be elected by a majority of the council membership
44 for one two-year term. Other officers may be

1 elected as needed in the same manner as the chair.
2 A majority of the membership of the council
3 constitutes a quorum for official business to be
4 conducted.

5
6 Section 44-35-350. Meetings of the council must
7 be held at least quarterly at the call of the chair
8 or may be called by a petition of two-thirds of the
9 council membership."

10
11 SECTION 2. Paragraph 8 of Section 8-17-340 of
12 the 1976 Code is amended to read:

13
14 "The committee may sustain, reject, or modify a
15 grievance hearing decision of an agency, ~~except~~
16 ~~that~~ However, in cases involving actual or
17 threatened mental or physical abuse, neglect, or
18 exploitation as defined in Section 43-35-10 of a
19 patient, client, or inmate by an employee, the
20 agency's decision shall must be given greater
21 deference and may not be altered or overruled by
22 the committee, unless the grievant establishes
23 that:

24 (1) ~~the agency's findings of facts are not~~
25 ~~sustained by the committee finding that the~~
26 ~~grievant abused, neglected, or exploited or~~
27 ~~threatened to abuse, neglect, or exploit a patient,~~
28 ~~client, or inmate is clearly erroneous in view of~~
29 ~~reliable, probative, and substantial evidence, or;~~

30 (2) ~~the committee finds that the agency's~~
31 ~~disciplinary action was not within its established~~
32 ~~personnel policies, procedures, and regulations,~~
33 ~~or;~~

34 3 (3) ~~the committee finds that the agency's~~
35 ~~action was arbitrary or and capricious."~~

36
37 SECTION 3. The felonies added by Section 1 of
38 this act must be added to the list of felonies in
39 Section 16-1-10 of the 1976 Code.

40
41 SECTION 4. Section 23-1-220 and Chapters 29 and
42 30, Title 43, Code of Laws of South Carolina, 1976,
43 are repealed.

44

1 SECTION 5. This act takes effect three months
2 after approval by the Governor.
3 -----XX-----
4

PUBLIC POLICY INSTITUTE

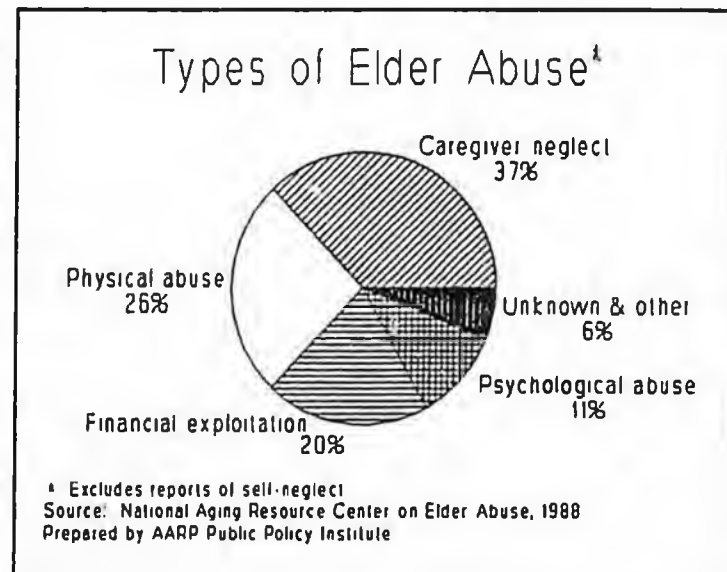
FACT SHEET

ELDER ABUSE AND NEGLECT

Types of Elder Abuse

Although the term "elder abuse" is commonly thought to mean acts of physical violence against older persons, it encompasses many different forms of dangerous behavior. Common forms of elder abuse and neglect are:

- Physical abuse - the intentional use of physical force causing pain or bodily harm.
- Psychological abuse - the intentional infliction of mental anguish by threat, intimidation, humiliation, or other abusive conduct.
- Financial exploitation - the conversion or unauthorized use of an elderly person's money, property, or other resources.
- Caregiver neglect - a caregiver's intentional or unintentional failure to fulfill a caregiving obligation needed to maintain an elderly person's well-being.
- Self-neglect - an older person's failure to provide himself or herself with the necessities of life, such as food, clothing, shelter, adequate medication, and reasonable financial management.



Prevalence of Elder Abuse

Each year, an estimated 1 to 2 million Americans are victims of elder abuse or neglect in domestic settings. Self-neglect comprises an estimated 40 to 50 percent of the cases reported to states' adult protective services (APS) units. Repeat elder abuse cases constitute nearly 20 percent of the reported instances of elder abuse and neglect.

A 1988 survey of nearly 600 nursing home staff suggests that elder abuse is a fact of institutional life: 40 percent of those surveyed admitted to personally committing at least one psychologically abusive act in the preceding year; 10 percent admitted to physically abusing patients.

Insufficient data, due in part to variations in the definition of elder abuse and neglect by states, may underestimate the prevalence of the problem.



Characteristics of Victims and Abusers

- The U.S. House of Representatives Select Committee on Aging reports that the most likely victims of elder abuse include: women; persons age 75 or older; and individuals who are isolated and dependent on others for care and protection.
- More than two-thirds of elder abuse perpetrators are family members, most often an adult child or spouse.

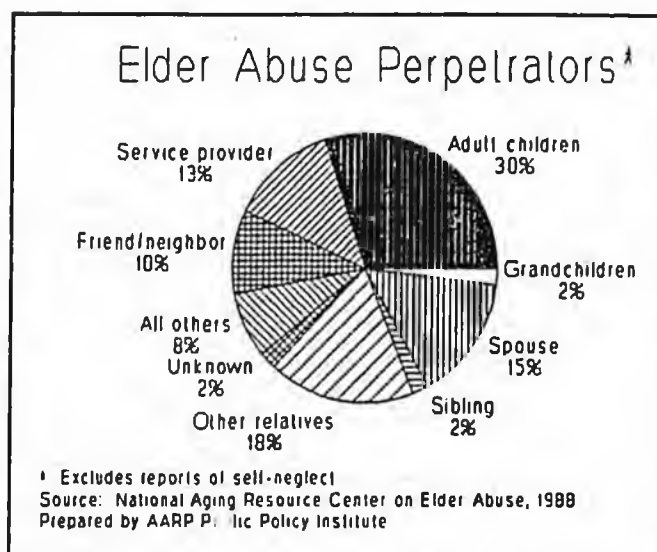
Addressing the Problem of Elder Abuse

A variety of federal and state laws and programs seek to detect, prevent, or remedy elder abuse:

- The criminal justice system enables victims to press criminal charges against their abusers. Domestic violence laws enable victims to obtain from the court protection orders compelling the abuser to leave the home.
- State long-term care ombudsman programs investigate and resolve complaints made by or on behalf of long-term care facilities' residents. Federal nursing home law guarantees residents' rights, including freedom from physical and mental abuse, right to privacy, freedom from discrimination based on source of payment, prohibition against involuntary transfer or discharge, freedom from chemical or physical restraints imposed for discipline or for convenience, and control of and protection for personal funds. In 38 states, Medicaid Fraud Control Units investigate and prosecute cases of patient abuse and neglect in long-term care facilities that receive Medicaid funds.
- State adult protective services programs receive and investigate reports of elder abuse and provide social and health services. The Older Americans Act provides eligible individuals with in-home supportive services and legal assistance, and earmarks funds for state programs to prevent abuse, neglect, and exploitation of the vulnerable elderly.

In spite of these laws and programs, elder abuse continues to increase. The Department of Health and Human Services' Task Force on Elder Abuse found these existing programs to have many limitations:

- insufficient data and research about and lack of uniform definition of elder abuse;
- lack of coordination and follow-through among agencies responsible for reporting, investigating, and developing policy to address elder abuse;
- little public knowledge about the extent and causes of elder abuse;
- inadequate resources to enforce statutes and to carry out services.



For more information, contact Elizabeth Clemmer at AARP's Public Policy Institute. FS22-4/93.

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Source: An Exploratory Study of Adult Protective Services Programs' Repeat Elder Abuse Clients, by Marsha Simon, October 1992.

ELDER ABUSE: THE NATIONAL PERSPECTIVE

WHAT IS ELDER ABUSE?

Multiple definitions of abuse exist and vary from state to state. Below are some definitions from the federal level found in the Older Americans Act of 1992.

Elder Abuse - defined as abuse of an older individual. 42 U.S.C.A. § 3002(24) (Supp. 1993).

Abuse - means the willful:

a) infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish;

OR b) deprivation by a person, including a caregiver, of goods or services that are necessary to avoid physical harm, mental anguish, or mental illness. 42 U.S.C.A. § 3002(13) (Supp. 1993).

Older individual - defined as a person who is 60 years of age or older. 42 U.S.C.A. § 3002(38) (Supp. 1993).

Neglect - defined as:

a) the failure to provide for ones self the goods or services that are necessary to avoid physical harm, mental anguish, or mental illness (self-neglect);

OR b) the failure of a caregiver to provide goods or services.
42 U.S.C.A. § 3002(37) (Supp. 1993).

Exploitation - means the illegal or improper act or process of an individual, including a caregiver, using the resources of an older individual for monetary or personal benefit, profit or gain. 42 U.S.C.A. § 3002(26) (Supp. 1993).

ELDER ABUSE STATISTICS

Who are the abused? Abused elders are spouses, parents, aunts/uncles, brothers/sisters, or any other relative, residents/clients, employers - from any and all walks of life. Some studies have shown white females are the most at risk, although such studies really are inconclusive.

Several studies estimate that as many as five percent of the nation's elderly may be victims of moderate to severe abuse. Nearly one out of every twenty or 1.5 million elders are victims of domestic and institutional abuse every year. [Source: House Select Committee on Aging, *Elder Abuse: A Decade of Shame and Inaction*. 1990.]

The National Aging Resource Center on Elder Abuse estimates that in 1988, there were 2 million reportable cases of domestic elder abuse. [Source: Tatara, Toshio *Elder Abuse in the United States: An Issue Paper*. NARCEA. 1990.] Researches estimate that only one out of fourteen cases is actually reported. [Source: The National Eldercare INstitute on Elder Abuse and State Long-Term Care Ombudsman.]

Who are the abusers? Although abusers come from as varied backgrounds as the abused, perpetrators were most likely to be adult children, with other relatives and spouses coming in close behind. Despite efforts to portray the victim as the dependent person in the relationship, it is often the abuser who is the most dependent, especially in domestic abuse situations.

It is apparent that both the incidence and prevalence of abuse is increasing. Studies show the rise in the occurrence of abuse but are unable to adequately portray the numbers. The abused and the abusers can not be ascertained by set definitions. Elder abuse remains a hidden phenomenon.

Theoretical Causes of Abuse

A. *Caregiver Stress*: The increased frustration and stress of caring for a parent, relative or resident may lead to abuse. This is particularly true when the caregiver is not prepared or lacking the needed resources to care for the elder.

B. *Impairment of the Elder*: Studies have shown a correlation between the type of impairment and extent of dependency upon the incidence of abuse. The more dependent and impaired an individual is, the more likely s/he is a victim of abuse.

C. *Pattern of Family Violence*: In some families, violence is a learned behavior and is transmitted from one family member to the next. When violence is learned, it becomes the normal and inherent response to any conflict, tension or stress.

D. *Personal Problems of the Caregiver*: Studies show abusers tend to have more personal problems than non-abusers. Problems include: mental and physical disorders, alcohol and/or drug addiction, and financial difficulty.

ISSUES SURROUNDING ELDER ABUSE LAWS

When elder abuse entered the public eye in the late 1970's, public outcry demanded that states react quickly to the problem. States responded by creating legislation modeled after the other "big" abuse problems - child and spousal abuse. After more than a decade of this "copycat" legal response, critics raise several questions as to whether legislation has been a positive response to the elder abuse phenomenon. What follows is a list of some of these critics concerns, and why they might be important to advocates dealing with elder abuse situations.

CONCERNS ABOUT THE CONNECTION WITH CHILD ABUSE LAWS

- Unlike child abuse, incidence of elder abuse are difficult to investigate. Many times, the older adult has limited social interaction. In the worst cases of abuse, the only contact the abused might have with the outside world is the abuser.
- Elder abuse is also much more difficult to detect than child abuse. The same injury that would cause suspicion in a child might be attributable to infirmities of age in an adult.
- Each state has a different definition of elder abuse. Some states may recognize self-neglect as a form as abuse, while another state does not.
- The legal response to child abuse is oriented to a situation that involves clear cut victims, accusers, offender behavior, and usually willing and cooperative witnesses. Unfortunately, with unclear definitions of abuse and abusers, elder abuse cannot fit into the "clear cut" case scenarios. [Source: Formby, W.A., "Should Elder Abuse Be Decriminalized? A Justice System Perspective," 4(4) Journal of Elder Abuse and Neglect 121 (1992).]
- Who does the advocate represent? Suppose an aunt and nephew enter your office and the nephew states he is seeking durable power of attorney over his aunt's substantial estate. Who is your client? This question is perhaps the most complicating of all issues, especially when the older adult is potentially incompetent.
- The intention of elder abuse laws, especially mandatory reporting laws, has been to assure assistance to defenseless victims. The assumption is that all elderly are not able to choose for themselves or are incompetent. On the contrary, most elders are independent and financially secure. [Source: Shapiro, J., "The Elderly Are Not Children: So How Come Abuse Laws Treat Them That Way," U.S. News and World Report, p. 26, January 13, 1992.]

- The assumption that elders (like children) are dependent upon their abusers is often wrong. In fact, usually the abuser is most dependent on the abused. Similarly, the elder may be both a victim of abuse, and an abuser. Some of the violence and abuse between elders and caretakers is mutual, especially when there has been an history of family violence. [Source: Utech, M. & Garrett, R. "Elder and Child Abuse: Conceptual and Perceptual Parallels", 7 Journal of Interpersonal Violence 418, (1992).]
- Most elder abuse laws that are based on child abuse focus on the physical aspects of abuse. Studies show, however, that the elderly are more prone to be victims of financial abuse. [Source: Shapiro, J., "The Elderly Are Not Children: So How Come Abuse Laws Treat Them That Way," U.S. News and World Report, p. 26, January 13, 1992.]

MANDATORY REPORTING CONCERNS

- Will reporting suspected abuse or neglect really promote the older adult's welfare if the only realistic remedy is placement in a nursing home - when the adult wished to avoid this from the start?
- Mandatory reporting laws require abuse to be reported by certain professionals and others close to older adults. But should abuse be reported over the objection of a competent older adult?
- At what point is suspicion reasonable such that mandatory reporting requirements and accompanying provisions providing immunity against defamation claims come into operation?
- When a state requires mandatory reporting, at what time does a professional (doctor, dentist, etc.) violate the doctor-patient confidentiality and report suspected abuse.
- Studies show that agencies that work most with elder abuse feel the most important thing for maximizing reports of elder abuse would be to increase public and professional awareness. Reporting laws were not considered particularly effective in preventing or treating abuse. (In-home services were noted by those surveyed as the most effective factor in preventing and treating elder abuse.) [Source: General Accounting Office Report, "Elder Abuse: Effectiveness of Reporting Laws and Other Factors," April 1991.]
- Physicians have a lower reporting rate for elder abuse than for child abuse. Reasons for the lower rate include:
 - physicians are uninformed about the existence of the state's mandatory reporting laws;

- physicians and other health care professionals are skeptical about the effectiveness of existing reporting laws to ensure the anonymity of the report and the reporter's legal immunity from prosecution for reporting;
 - a belief in patient - client confidentiality;
 - a fear of lengthy court appearances; and
 - a belief that the victim will deny the charges anyway. [Source: Tataro, T. National Aging Resource Center on Elder Abuse (NARCEA), "Elder Abuse in the United States: An Issue Paper, " 1990.]
- Punishments/penalties for not reporting abuse are rarely enforced.

CONCERNS ABOUT THE CONNECTION TO DOMESTIC/SPOUSAL ABUSE LAWS

- Some state laws require that the abused file a separation order or divorce decree before any action is taken against the abuser. In most instances the abused spouse is unwilling to take such a drastic measure.
- Services for spousal abuse victims are not usually geared to the elderly (i.e. battered women shelters are targeted to younger women with children).
- Definitions of domestic abuse tend to be limited to incidence of direct physical and psychological abuse, whereas elder abuse encompasses a variety of types and definitions of abuse.

GENERAL IMPLEMENTATION CONCERNS

- States are reluctant to strengthen reporting systems or outreach because of a fear that APS agencies may be flooded with probable cases. [Source: Thobaben, "State Elder/Adult Abuse and Protection Laws," in Filinson and Ingman (eds.) , Elder Abuse: Practice and Policy, P. 148.]
- States lack elder abuse prevention programs. Many times this is because states lack any funding to prepare such preventative measures.
- There is a lack of coordination between state agencies that deal with elder abuse. Given that agencies each play diverse roles in the detection, prevention, and protection of elder abuse victims, without agency coordination the victims of abuse are not getting the services that they need.

THE LEGAL RESPONSE TO ELDER ABUSE

Since the late 1970's there has been little coordinated Federal response to elder abuse. States have been left to their own devices to deal with the various aspects of the problem. Check with authorities in your state to receive appropriate response alternatives.

I. LEGAL METHODS TO *PROTECT* ABUSED OR AT-RISK ELDERS

A. *Adult Protective Services (APS)*

1. Most states have Adult Protective Services laws which:
 - a) receive reports of abuse and/or neglect.
 - b) investigate suspected abuse and/or neglect.
 - c) provide protective services to the *consenting* older adult, and
 - d) intervene on behalf of incompetent persons (without consent) who are being abused, neglected or exploited.

NOTE: Although APS allows advocates to protect those who are unwilling to receive assistance, it is important to remember that every competent individual has the right to make their own decisions, even if it is a bad decision.

B. *Mandatory Reporting Laws*

1. As of November of 1990, 42 states and the District of Columbia had mandatory reporting laws in which doctors, nurses, social workers, and other persons designated by the state are legally required to report suspected abuse cases. [Source: GAO Report, *Elder Abuse: Effectiveness of Reporting Laws and Other Factors*, April, 1991.]
2. The remaining states (Colorado, Illinois, New Jersey, New York, North Dakota, Pennsylvania, South Dakota, and Wisconsin) have voluntary reporting laws.

C. *Guardianship and Conservatorship* (Check state law for the difference between the two)

1. A highly intrusive measure in which another is given the right to make decisions for, and act on behalf of the elder adult.
2. Procedural considerations:
 - a) usually, a petition is filed with probate court in the county where the individual resides or has property.
 - b) usually, there are very few limitations on who can file the petition for guardianship/conservatorship.
 - c) proposed ward's rights:
 - notice must be given to the proposed ward in all states
 - some states require the ward's presence at the hearing
 - all states recognize the ward's right to counsel, but few provide counsel
 - most states require appointment of a disinterested person to investigate alleged facts and to report to the court
 - d) guardians are supposed to be monitored by the court to protect from further abuse, etc.
3. Substantive considerations:
 - a) Most states have a two prong test for incompetency:
 - 1) the individual has an underlying physical or mental conditions, and
 - 2) as a result, the individual can no longer care for self.
 - b) Some states have adopted functional tests of incapacity in which an individual is impaired if s/he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his/her person, or property will be dissipated or wasted unless proper management is provided.

NOTE: Guardianship/conservatorship is an extremely inhibiting method of protection. It is always wise to consider the least restrictive alternative of assisting the older adult.

ADVOCACY TIP: A good question for advocates to ask when considering guardianship as an alternative for older adults is: "Would guardianship be the alternative of choice if this person were 30 years old instead of 90 years old?"

II. LEGAL METHODS FOR *PREVENTING* THE ABUSE OF ELDERS

A. *Pre-incapacity Planning*

1. ***Joint Property Arrangements:*** When two or more persons have co-ownership over an asset. This is beneficial when the elder adult is capable but unable to go to the bank, etc.

NOTE: Drawbacks include a potential for misappropriation of funds by a dishonest co-owner.

2. ***Power of Attorney:***

- a) **General Power of Attorney:** An older adult appoints a person (agent) to act on his/her behalf. A regular Power of Attorney terminates if the older adult becomes incapacitated.
- b) **Durable Power of Attorney:** The agent is authorized to act in the older adult's behalf before and after incapacity.
- c) **Springing Durable Power of Attorney:** The authority to act as agent or attorney-in-fact is not activated until the older adult becomes incapacitated.
- d) **Health Care Durable Power of Attorney:** Allows the agent to make only health care decisions for the older adult before and after the elder is incapacitated.
- e) **Disadvantages of Powers of Attorney:**
 - 1) Potential of abuse by the agent. As a fiduciary, however, the agent can be sued for mismanagement (see Section III: Prosecution).
 - 2) Agents are not under court supervision.
 - 3) Some banks may not recognize Durable Powers of Attorney, even with proper forms and identification, unless the principal had signed the form the bank uses to designate an agent or attorney-in-fact.

3. ***Trusts***

- a) **Defined:** Property is transferred by one person for the benefit of him/herself or another party and is administered or managed by a third party.
- b) A revocable inter vivos trust becomes operative during the grantor's

lifetime and can be fixed to "spring" at grantor's incapacity.

- c) One disadvantage with traditional trusts is the large legal fee required to establish the trust. The recent Uniform Custodial Trust Act, however, allows low and middle-income individuals to set up trusts through a simple statement noting the trust was established under the provisions of the act.

4. *Money Management Devices*

Designed to assist those who have difficulty handling routine financial matters. These methods have several advantages including: low risk of financial abuse; allowing the older adult as much control and autonomy over finances; and the establishment of these methods is easy and inexpensive.

- a) **Direct Deposit:** benefit payments and other money is deposited directly into the older adult's bank account.
- b) **Automatic Banking/Bill paying services:** some banks or professional bill paying services will pay a customer's bills automatically.
- c) **Utility late payment backup reporting:** some utility companies will notify a designated third party when an older adult's services are in danger of being cut off due to past due bills.

5. *Representative Payeeship*

- a) Individuals are appointed by the agency to receive Federal benefit checks on behalf of recipients who are unable to manage their benefits. The authority given to the representative payee extends only to the benefit.
 - 1) A payee can be a friend, relative or stranger.
 - 2) Recent legislation now requires the Social Security Administration (and only the Social Security Administration) to investigate payees, but only after their appointment. 42 U.S.C. § 405(j)(2) (Supp. 1990).
- b) Disadvantages of a representative payee:
 - 1) The payee is not monitored by the agency or the courts.
 - 2) Agencies have no remedies for persons financially abused by a payee.

B. *Community Based Services*

1. The outside assistance provided by Community Based Services (home health, volunteer programs, meals-on-wheels, etc.) can be helpful tools in preventing abuse.
2. Funds for such services may be provided through Medicare, Medicaid, SSI, etc. (Check eligibility requirements for all). States are also required to provide in-home services with a portion of allotted money from the Older Americans Act (Title III) funds. 42 U.S.C. 3026(a)(2)(B).

Social Service Block Grants (SSBG) may also provide some support for in-home care. States allocate these funds at their discretion, and usually little money is available for community based care programs.

III. LEGAL METHODS FOR THE PROSECUTION OF ALLEGED ABUSERS

A. *Possible Civil Actions*

1. **Assault and Battery** - for cases of physical abuse.
2. **False Imprisonment** - an alternative for use of excessive restraints.
3. **Negligence/Malpractice Action** - mismanagement of funds, care, etc.
4. **Injunction/Temporary or Permanent Restraining Order**
5. **Restitution**

B. *Advantages of Civil Actions*

1. Removal of the abuser from the victim's presence creates a safer environment.
2. It may assist the abuser in getting counseling or assistance.

C. *Disadvantages of Civil Actions*

1. In some states, these remedies are available to abused spouses only. Furthermore, other states limit protective orders to those who have filed separation agreements or divorce petitions.

2. In many states, only the victim may file for protective-type orders. If the older adult fears provoking more abuse, alienating the family, or isolation, s/he will not file for protection.
3. Any award of damages affects benefit payments. Some states, however, have adopted laws which disallow counting damage awards as income or resources.
4. The victim may die before the civil case comes to court. In some states then the tort action would die too. Even if the case did not terminate at the death of the victim, many juries are unwilling to award damages to family members.
5. Statute of limitations - if the appropriate time limit has passed, the civil case now becomes a contract dispute between the abused and the caregiver, and any abuse is considered merely a breach of contract.
6. An abusive caregiver is better than no caregiver. This is especially true when supportive services are difficult to identify. For many older adults, they see the only alternative to abuse as institutionalization.

C. *Possible Criminal Actions*

1. **Assault/Battery/Reckless Endangerment** - for cases of physical abuse.
2. **Burglary/Extortion** - for cases of financial abuse
3. **Special provisions for crimes against elders** - Some states have passed provisions which enhance the penalty for crimes committed against the elderly, or impose penalties for abusive actions taken by caregivers and institutions.

D. *Advantages to Criminal Prosecution*

1. Pressing charges may assist the abuser to get court mandated counseling or assistance.
2. Removal of the abuser from the victim's presence creates a safer environment.
3. It may serve as a deterrent to future abuse if the abuser realizes s/he may be criminally liable for his/her actions.

E. *Disadvantages to Criminal Prosecution*

1. The elder refuses to press charges because s/he fears retaliation.
2. Even after initially pressing charges, the older adult may change his/her mind and drop all charges.
3. The elder does not wish to "cause trouble" for the abuser, especially when the abuser is family.
4. The older adult may be too ashamed or embarrassed to admit his/her family member is abusive.
5. The physical and emotional strain of filing a complaint may be too intimidating to the older adult.
6. In some cases, the older adults wants only rehabilitation for the abuser and when it becomes apparent that the abuser may spend some time in jail, the victim will drop the charges.

IV. INSTITUTIONAL ABUSE

A. *State Long-Term Care Ombudsman Programs:*

- a) In cases of elder abuse, a state ombudsman might investigate and resolves any complaints made by or on behalf of residents of long-term care facilities, including complaints of abuse.
- b) Ombudsman programs vary from state to state, but usually the State Unit on Aging or the Department on Aging houses the state-wide ombudsman program.

B. *Nursing Home Laws:*

- a) Omnibus Budget Reconciliation Act (OBRA)
 - 1) Implemented a resident bill of rights which protects those adults in institutions. Among one of the rights is the right to be free of physical, psychological, or sexual abuse or punishment. 42 C.F.R. 483.10(e) (1992).
 - 2) Developed stricter nursing aide training and evaluation requirements. States are required to establish a registry of aides who have satisfactorily finished the training and information about

aides involved in incidences of resident abuse, neglect, or misappropriation of resident funds. 42 U.S.C. § 1395i-3(b)(5); 42 U.S.C. § 1396r(b)(5),

- 3) Required more professional nursing staff.
- 4) Made significant changes in the survey and certification process. 42 U.S.C. 1395i-3(g); 42 U.S.C. 1396r(g). The law now requires a multidisciplinary team to survey, in depth private interviews with residents, private discussions with the resident council, and interviews with family members.
- 5) The facility must furnish a written description of legal rights which includes a statement that the resident may file a complaint with the state survey and certification agency concerning resident abuse, neglect, and misappropriation of resident property in the facility. 42 C.F.R. 483.10.
- 6) Facilities are required :
 - a) to implement written policies and procedures that prohibit mistreatment, neglect or abuse of residents;
 - b) to not employ persons convicted of abusing, neglecting or mistreating individuals;
 - c) to ensure that violations are reported to the administrator or other officials in accordance with state law through established procedures;
 - d) to have evidence that alleged violations are investigated; and
 - e) to report the results of investigations to the administrator or other officials. 42 C.F.R. 483.13.

C. Medicaid Fraud Control Units (MFCU)

- a) MFCU's are law enforcement units authorized by federal law to investigate and prosecute cases of neglect and abuse of individuals in facilities that receive Medicaid funds. 42 U.S.C. 1396b(q)(4).
- b) The state MFCU is composed of attorneys, auditors and investigators managed by a unit director, typically an Assistant Attorney General.
- c) Any person or entity convicted of program-related abuse or neglect are excluded from a number of government health programs, including

Medicaid, Medicare, and Block Grant Programs. See Summit Health Ltd., dba Marina Convalescent Hospital v. The Inspector General, HHS Departmental Appeals Board, Appellate Dev.: June 29, 1990.

Elder Abuse

A Family Tragedy

by Rosalie S. Wolf

The *International Year of the Family* provides a fitting context in which to discuss one of the darker sides of family life: the phenomenon that has come to be known as elder abuse. First described in British scientific journals as "granny bashing" and introduced in the U.S. as "parent battering," it has moved into the political arena alongside child and spouse abuse. The 1993 launching of *Action on Elder Abuse* in the United Kingdom, the publication of a position paper on elder abuse by the Canadian parliament, and the establishment of a National Center on Elder Abuse in Washington, D.C. attest to its legitimacy as a pervasive social problem.

Disclosures that older persons are being abused, neglected and exploited by family members and others in whom they have placed their trust have prompted scientific and governmental activity throughout the world. The revelations from Britain and the U.S. in the 1970s were followed in the 1980s by studies from Canada, Norway, Sweden, Hong Kong, and Australia, and in the 1990s by a report of the Council of Europe's Study Group on Violence Against Elderly People in which 22 European countries participated. Although the existence of the problem is now well

documented, data on its incidence and prevalence have not been easily obtainable, nor its causes fully understood or interventions evaluated.

Scope of the Problem

In 1985 and 1986, a research team in the U.S., using a method validated in two national family-violence surveys, interviewed over 2,000 elders living in the metropolitan Boston area by telephone or in person.¹ They found that 3.2% had experienced physical abuse, verbal aggression, and/or neglect since reaching age 65. Spouse abuse was twice as prevalent as abuse by adult children, the proportion of victims was roughly equally divided between males and females, and economic status and age were not related to the risk of abuse.

The Boston survey questionnaire with financial abuse added was repeated on a national representative sample of non institutionalized Canadian elders.² Four percent of those able to respond to a telephone call had experienced one or more forms of mistreatment. Again, the rates for men and women were about equal, but financial abuse was more prevalent than physical or verbal aggression, or neglect. Another variation of the Boston and Canadian studies was utilized by a British group.³ Recognizing some of the difficulties in carrying out the investigation in their particular part of London (few telephones, multi-ethnic population), re-

searcher had several of the Boston survey questions added to the national annual Omnibus Survey. Based on a representative sample of 2,000 adults, of whom 593 were 65-plus, the findings showed that nationally 5% of the elders reported having been recently verbally abused by a close family member of relative; 2% physically abused; and 2% financially exploited.

In a small, semi-industrialized town in Finland, researchers used postal questionnaires, interviews, and clinical examinations to determine the rate of physical, psychological, and sexual abuse; neglect; and economic exploitation experienced by the elderly population after the age of retirement.⁴ They found 5.4% prevalence rate of abuse in family settings by relatives: 2.5% for men and 7% for women.

If financial exploitation is added to the prevalence rate for elder abuse in the Boston area, it is estimated that the percentage in the U.S. would be closer to the 5% reported in the other countries. Still, these numbers must be considered minimum figures given the secrecy, denial, and guilt associated with this problem and the omission of cognitively impaired elders from those surveyed.

How Common Is Violence Against the Elderly?

Abuse involving violence and theft rather than neglect is reportedly more common among older Canadians than previously assumed. The *Maison Jeanne Simard*, Canada's first shelter for abused elderly, reports that cracked ribs, cigarette burns, forced starvation and stolen pension checks are often the experience of those it serves. Since its founding in 1992 by Johanne Cotnoir, a Montréal gerontologist, the shelter has accepted 55 elderly people.

Further evidence about the frequency of abuse in Canada includes a survey taken in 1990, which revealed that of the 90,000 seniors living in private dwellings who are victims of abuse, 12,000 suffered from physical abuse. Other studies show that 4% to 12% of older Canadians can be considered abused. (*International Federation on Ageing Newsletter*, 2/94.)

Risk Factors and Characteristics

Even with evidence to the contrary, the tendency in the early years was to regard the stress of caring for dependent family members as the leading cause of elder abuse and neglect. This view was particularly attractive to politicians, the media and the public. It was easier to blame the victim than to challenge societal and family customs that allowed the mistreatment to occur. Besides, this interpretation of elder abuse could be accommodated within the traditional child abuse framework. It assumed the victim to be vulnerable and dependent upon family caregivers for physical, emotional and financial support. In fact, reports of elder abuse cases collected by health and welfare agencies did show that, on average, victims were over 75 years of age, female, with physical and mental impairments and dependent on the perpetrator.

The desire to move beyond the relatively simplistic and incomplete early depiction of the problem led researchers to examine how individual, familial, and cultural factors were related to family conflict.⁵ Comparative studies of cases by type of abuse disclosed distinct profiles for abuse, neglect, and financial exploitation. Physical and psychological abuse were more closely associated with the problems of the perpetrator than the victim. Poor emotional health but relative independence in carrying out the activities of daily living were characteristic of the victims whereas perpetrators were more likely to have a history of psychopathology and to depend on the victim for financial resources. Since these forms of abuse involved family members who were most intimately related and emotionally connected, it is likely that this type of mistreatment has its underpinnings in long-standing, pathological family dynamics and interpersonal processes that become more highly charged when the dependent relationship is altered either because of illness or financial needs.

In marked contrast to the cases of physical and psychological abuse, those involving neglect seemed to be very much related to the dependency needs of the victims who were often widowed, very old, with cognitive and functional impairments. For the perpetrators in these situations, caring for these victims was a source of stress. In financial abuse cases, the motivating factor appeared to be greed rather than individual pathology or victim dependency. These perpetrators often had financial problems and histories of substance abuse. The victims were likely to be widowed, with few social contacts.

Victim-perpetrator dependency, perpetrator psychopathology, and caregiver stress emerge from the comparative studies as major risk factors for elder mistreatment with substance abuse and social isolation as serious contributing elements. Other factors that have been associated with child and spouse abuse such as the intergenerational transmission of violence and stressful life events have not yet been supported by elder abuse data.

Solutions

United States. Although the U.S. Congress played a prominent role in drawing the attention of the nation to the problem of elder abuse beginning in the late 1970s, finding solutions was left to the 50 states. Following a national protective services demonstration project in the mid-70s, grants were awarded to the states for the provision of services to protect all adults, 18 years or older, who were incapable of caring for themselves or in danger of abuse, neglect or exploitation. Some states adopted specific legislation, establishing an adult protective service system; a few added "adults" to their existing child protection laws that had been passed almost a decade earlier.

Once elder abuse became linked with family violence, state legislators reacted by pressing for special elder abuse laws. Within a few years, most states had passed new statutes or amended their existing adult protective service legislation. Because no model statute or data base on elder abuse existed, the child abuse law with its mandatory reporting of suspected cases became the prototype. In more than three-quarters of the states, the services are provided through the state social service departments (adult protective services); in the remaining, the state units on aging have the major responsibility. Some systems have a state administered system with a field office in the counties while others are administered by the county with state supervision. The result is not only interstate but also intrastate variation in the programs.

Generally, states or their designated units are responsible for receiving reports of suspected cases of elder mistreatment, screening for potential seriousness, conducting a comprehensive assessment if indicated, and developing a care plan. As soon as the immediate situation is addressed, the case is turned over to other community agencies for ongoing case management and service delivery.

When elder abuse was thought to be primarily a re-

sult of caregiver stress, reducing the dependency of the victim on the caregiver was the primary goal of treatment. Skilled home nursing, personal care, homemaker and chore services, respite care, meals-on-wheels, day care, friendly visitors, and emergency shelter have been employed to assist the caregiver, although not all of these programs are available throughout the country. The realization that the financial and emotional dependency of the perpetrator on the victim is an important risk factor, particularly in cases of physical and psychological abuse, has suggested another set of intervention possibilities: vocational counseling, job placement, housing assistance, alcohol and drug treatment, mental health services, and financial support. Because the emphasis in most adult protective service units is on helping the victim and funding is scarce, perpetrators with special needs are referred to other community programs; often, however, the perpetrators are unwilling to accept help or absent themselves from the situation.

As the conceptualization of the problem of elder abuse has moved further away from the child abuse model and closer to that of spouse abuse, the role of law enforcement has taken on greater significance in treatment and prevention. It is the contention of the criminal justice system that actions in violation of the criminal and civil codes should be prosecuted, even though many victims are unwilling to press charges. This attitude, as well as greater awareness of elder abuse among police and prosecutors, has resulted in a trend among the states to increase the penalties for mistreatment of older persons.

The federal government policy role is still a minor one even though the U.S. Congress finally established a *National Center on Elder Abuse* after more than a decade of advocacy by congressional partisans. The center operates a clearinghouse, disseminates information, offers technical assistance, and conducts research and demonstration projects. Under a new title in the 1992 reauthorization of the Older Americans Act of 1965, states are allocated a small amount of money to develop, strengthen and carry out programs for the prevention and treatment of elder abuse, neglect and exploitation.

Canada. Canada's response to elder abuse has been primarily at the community or municipal level. However, within the past few years, the federal, provincial, and territorial governments have formed interministerial committees on family violence, some of which have

subcommittees on elder abuse. As reported in *A Shared Concern*, an overview of Canadian programs addressing the problem of elder abuse, current activity tends to be "scattered, uncoordinated and in the early stages of development."⁶ In answer to a national survey, almost three-quarters of the respondents stated that they were dealing with elder abuse as part of a broader-based approach to family violence. Health and social services were the most likely to encounter elder abuse, with the police and legal services becoming involved after the initial contact. Except for the four Atlantic provinces that have specific older-adult protection legislation, of which two include mandatory reporting, elder abuse is being addressed through existing criminal, mental health and guardianship laws.

Although there are some coordinated, interdisciplinary programs across the country and ongoing research studies, the major activities have primarily been raising awareness, sharing information, and making referrals.

A 1993 report to the House of Commons by the Sub-Committee on Senior Citizens Health issues included a wide range of recommendations.⁷ It called for the establishment of consistent usage of terminology, funding of research into risk factors, annual gathering of data on abuse, promotion of partnership among federal departments to address abuse, development and dissemination of educational materials aimed at prevention, provision of funds to support services, and review of existing legislation as to its effectiveness in addressing elder abuse.

United Kingdom. Despite early recognition of the problem, activities in the United Kingdom have lagged more than a decade behind the United States. Renewed interest in elder abuse, which began in the late 1980s, resulted in several research and policy reports that helped to bring together a small group of health and social service professionals committed to

increasing public and professional awareness. Guidelines for identification and care management of elders at risk of abuse and neglect have been produced by professional organizations and a number of social service departments, whose social workers have been given primary responsibility for investigation. The launching of *Action for Elder Abuse* with support from Age Concern and the imprimatur of the national government, has added impetus and a national focus for mobilization of both the public and professional communities.

Australia. Most of the activity regarding elder mistreatment in Australia has been at the state level with the cre-

ation of committees or task forces to investigate the issue although a national working party was to be established in 1993. Recommendations from the various groups emphasize the need for the establishment of guidelines and procedures to deal with the cases and coordination among the health, welfare and criminal justice agencies. For Australian states, the question remains as to what agency, or whether one agency, should have primary responsibility.

Other Countries. Although studies on elder abuse have been reported from Norway, Sweden, Finland, Israel, Hong Kong, and Greece, none of these countries has a national policy. Several interesting programs have been described, such as the shelters for abused elderly women in Finland and the social worker

"mediator" assigned to a senior citizens center in Norway to handle the abuse cases, but they are not part of a planned service delivery system. Two U.K. researchers, Bennett and Kingston, using Blumer's model of social problem construction, have outlined the steps that are necessary for the institution of a system for dealing with elder abuse: emergence, legitimization, mobilization of action, formulation of an official plan, and implementation of the plan.⁸ To date, most countries other than U.S., Canada, and the U.K. are either in the emergence or legitimization stages.



*Physical and
psychological abuse
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problems of the
perpetrator than
the victim.*

Conclusion

The response of the world to the problem of elder mistreatment has been encouraging even though it has been slower than that of child abuse. As with other forms of domestic violence, elder abuse challenges beliefs in the sanctity of the home and the inherent goodness of man. But unlike child abuse, it also raises basic ethical and legal dilemmas regarding the elder's right to self determination and society's desire to intervene.

The multiple dimensions and variations of elder mistreatment have forced researchers to give up the search for one unifying theoretical model. Initial efforts to arrive at a common definition have been put aside. Instead, researchers are asked to describe the parameters of their study with regard to type, frequency, duration, intensity, severity, intentionality and consequence of the behavior so that useful comparisons among findings can be made. Although some risk factors for elder abuse and neglect have been identified, additional studies are needed to determine its etiology.

Interested professionals and governments are grappling with how best to meet the needs of abuse victims and their families: through current legal codes or new protective legislation? the public or private sectors or both? a family violence or inadequate care model? or an integrated or segregated system of service delivery? New studies from the U.S. and Canada reveal that perceptions of elder mistreatment among sub-groups of diverse racial and ethnic backgrounds may differ from

community standards. To arrive at a better understanding of this difficult problem, the experience of all countries will be needed. ■



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Fighting Against Financial Exploiters

Case History

At the age of 91, Lillian Mitchell found herself evicted May 9, 1992, from the home where she had lived for more than 45 years in Santa Barbara, CA. Though a Superior Court judge later ruled that she had been evicted illegally and allowed her to move back into her home, Mrs. Mitchell filed a lawsuit in August 1992 alleging that several people, including her one-time financial consultant, conspired to steal her home. The suit lists breach of fiduciary duty, fraud, elder abuse and negligence. No. 193704 (Santa Barbara Super. Ct. 1992).

With the graying of America, cases like Mrs. Mitchell's may become depressingly common. Already reports of financial exploitation cases are on the rise. The National Aging Resource Center on Elder Abuse estimates that financial exploitation is the second or third most reported type of elder mistreatment. Abusers can include:

1. Family members taking money or abusing the authority granted in a power of attorney or guardianship.
2. Phony contractors and other vendors selling substandard services or unneeded mortgages.
3. New "friends" who formally or informally take on the role of helping elders.

Vulnerable elders all too often find that traditional legal actions put roadblocks in the way of their getting adequate remedies. Elders may be confused, dependent upon the perpetrator, or unable to afford the cost of litigation. They also may have a difficult time finding attorneys willing to prosecute. Or they may be unable to meet the burden of proof in a tort or contract action.

How to Protect Elders

To combat the problems, two states have enacted legislation aimed at protecting the rights of vulnerable elders.

Maine's Solution

The Improvident Transfers of Title law seeks to protect dependent elders in Maine from being taken advantage of by people who have a confidential or fiduciary relationship with them. The law defines a dependent elder as someone 60 or older who is wholly or partially

dependent upon another person for care or support. These elders need care either emotionally or physically because they:

- Suffer from a significant limitation in mobility, vision, hearing, emotional or mental functioning.
- Suffer or are recovering from a major illness.
- Face or are recovering from major surgery.

Most importantly, the law creates a presumption of undue influence if a transfer of property takes place for less than full financial value to a person with whom the dependent elder has a confidential or fiduciary relationship. The only exception is if an independent counsel represented the dependent elder.

The Maine law thus shifts the burden of proof in such cases to the perpetrator. This is important since clients may not be capable of providing sufficient proof of bad faith on the perpetrator's part.

Failure of the perpetrator to rebut the presumption allows the dependent elder to avoid the transfer. The law provides

The National Aging Resource Center on Elder Abuse estimates that financial exploitation is the second or third most reported type of elder mistreatment.

such remedies as reformation of deeds, the imposition of constructive trusts on property, or orders to return the property.

California's Remedy

California's Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) is the first significant attempt by a state to protect the legal rights of vulnerable adults from abuse.

The new law targets all people over 65 as well as "dependent adults." The term "dependent adult" includes "any person between 18 and 64 who has physical or mental limitations which restrict his or her ability to . . . protect his

or her rights."

EADACPA protects elders and dependent adults from physical abuse, neglect and fiduciary abuse. Fiduciary abuse is defined as a situation in which a person who has the care and custody of, or who stands in a position of trust to an elder or dependent adult, takes, hides, or appropriates the person's money or property to any use or purpose not in the due and lawful execution of his or her responsibility.

According to the state law, friends of impaired elders, attorneys-in-fact, guardians, businesses and perhaps even banks may find themselves within the ambit of the definition of trust. EADACPA also broadens the remedies available to elders:

1. It requires courts to award attorney's fees and costs to a successful plaintiff.

This is important in encouraging attorneys to take these cases, even if the plaintiff cannot afford to pay attorney's fees. People may be agreeable to settle the cases more promptly if the plaintiff's attorney's timeclock is ticking.

2. It allows post-mortem recoveries for the victim's pain and suffering up to a limit of \$250,000.

This is important since frail abused elders often die before damages are awarded. Pre-EADACPA, recovering anything for pain and suffering after the victim's death was not possible. This gave defendants an incentive to delay going to trial.

3. It gives the Probate Court general jurisdiction to hear and decide all aspects of claims for relief under the Act, if a conservator has been appointed for plaintiff prior to the initiation of the action for abuse.

This is important since the Probate Court traditionally deals with protecting vulnerable adults. These courts also expedite their procedures to get matters before the judge more rapidly.

EADACPA provides one of our best hopes for preventing abuse in the future. Other states may want to follow California's lead in this effort.

DaCosta R. Mason

The Elder Abuse and Dependent Adult
Civil Protection Act
(Chap. 774, Stats. 1991)

by Marc Hankin, Esq.
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December 2, 1991

The Elder Abuse And Dependent Adult Civil Protection Act ("EADACPA" pronounced *ee-dak-pa*)¹ was signed into law by Governor Pete Wilson on October 10, 1991. Co-authored by Senators Henry Mello (D) and Ed Davis (R), and lobbied extensively by Senator Herschel Rosenthal, the new law is likely to have more impact on the quality of life for elders and dependent adult than any civil rights legislation within the last several years.²

EADACPA was the outgrowth of the perception of the author of this article that because elderly people are frail, (i) they are particularly vulnerable to physical and financial abuse, (ii) they gravitate into situations in which they are easily abused, such as mortgage swindles due to cash flow problems, and nursing home abuses due to health care problems, (iii) they are sought out by a growing army of people who prey on them, and (iv) they are unable to benefit from the protections which the criminal and civil tort systems currently purport to afford them.

¹ Senate Bill 679 renames Chapter 11 (commencing with Section 15600) of Part 3 of Division 9 of the Welfare and Institutions Code as the "Elder Abuse and Dependent Adult Civil Protection Act." Article 8.5 (Sections 15657 through 15657.3) is added to Chapter 11 and entitled "Civil Actions for Abuse of Elderly or Dependent Adults."

² EADACPA was a Beverly Hills Bar Association resolution conceived and drafted by the author of this article. The resolution was adopted at the 1989 State Bar Conference of Delegates after having been proposed twice, and was enacted in its third trip through the Legislature. It was formally sponsored by the Beverly Hills Bar Association with principal lobbying support provided by California Advocates for Nursing Home Reform, the L.A. Caregiver Resource Center, the Alzheimer's Disease Association, Catholic Charities and, of course, the Beverly Hills Bar Association. Significant support was also provided by Lieutenant Governor Leo McCarthy, the Executive Committee of the State Bar's Estate Planning, Trust and Probate Section, the District Attorneys Association, the Crippled Children's Society, the Multiple Sclerosis Society, Senior Alliance, the California Society for Clinical Social Work, the L.A. District Attorney's Office, AARP, the Mental Health Association in California, and the Long Beach Frail Elderly Task Force, etc.

The author wishes to thank the forgoing persons for their behind the scenes lobbying and organizational support without which this legislation would not have been enacted: Wayne Friedlander of the L.A. Caregiver Resource Center, Patricia McGinnis of California Advocates for Nursing Home Reform and Burns Vick, Esq.

The Elder Abuse and Dependent
Adult Civil Protection Act

by Marc Hankin, Esq.

December 2, 1991

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For example, ill elderly nursing home patients often have been over-drugged and tied up for the convenience of the staff. Unable to care for themselves, they have voluntarily or involuntarily moved into facilities where the health care industry has often neglected their hygiene and bedsores. Too demented by their illnesses or the drugs they are fed, they cannot testify about the wrongs inflicted on them. The criminal system rarely intervenes because the burden of proving criminal malice and responsibility *beyond a reasonable doubt* is usually an insurmountable burden.

The civil tort system also has largely abandoned the elderly to health care facility abuse. Too frail to survive long enough for a lawsuit to come to the judgement phase *before their death, even with a special trial setting*, the elderly have often been unable to attract plaintiff's counsel, even when the facility's abuse is obvious and egregious. Lawyers know that the victim's pain and suffering, the main damages in these cases, is *not* recoverable under existing law if the victim dies before the judgement is entered, and elderly victims of facility abuse often die quickly.

Plaintiff's personal injury lawyers typically get their fees out of a recovery for the victim's pain and suffering. But if the victim dies before the judgment is entered, the lawyer gets no pay for the work and money invested in representing the client. The lawyers therefore have had little financial incentive to take cases involving abuse of the frail elderly. Moreover, such cases are expensive to litigate inasmuch as they are characterizable as medical malpractice and require extensive discovery and expert witnesses. Thus, the contingent fee system, which was designed to enable the little person to hire a lawyer he or she could otherwise not afford, has failed to serve the frail elderly.

Financial abuse of the elderly has been growing, largely unimpeded by the tort system. Phony contractors and other vendors find declining elders and sell them substandard services or an un-needed mortgage at usurious interest rates. Then, there is also the new "friend" who cuts the declining victim off from family and the rest of the world "because they don't really care about you anyway." The new friend often gets a durable power of attorney, a new will, and hurries things along by using the durable power of attorney to move the money from the elder's account into the new friend's account "for safekeeping." Sometimes the money goes to the new friend as "compensation" for the friend's self-sacrifice in providing so much service to the progressively disoriented elder or dependent adult. It is not uncommon for the frail elder to then "forget" to take his or her medication, to "refuse" to see a doctor, and to die of a treatable condition aggravated by malnutrition. "She refused to eat anything. There was nothing I could do."

Criminal suits are rarely filed against such abusers because it is usually not possible to prove beyond a reasonable doubt that the old lady was incompetent when she gave away her money *and* that the "friend" knew it. Civil tort cases, brought by a conservator for the victim, are often unsuccessful because the abuser uses the victim's own money to pay for a vicious war of litigation attrition. Abusers know that the most they have to fear is a court order to give the money back, and they tend to fight long and hard. Conservators and their attorneys know that the Probate Court is uneasy about awarding big fees to the conservator and the conservator's attorney for protracted litigation if the conservatee may be left without enough to pay for the care he or she needs. Accordingly, blatant cases often settle for a relative pittance.

1. PURPOSE.

EADACPA proclaims that it is intended to protect elders³ and dependent adults.⁴

EADACPA makes a legislative finding that:

- (i) Elders and dependent adults are a disadvantaged class,
- (ii) criminal prosecutions against abusers of elders and dependent adults are rare; and
- (iii) few civil suits are filed due to problems of proof and court delays.⁵

³ Welf. & Inst. Code §15610(a) provides that anyone over the age of 65 who resides in California is an "elder."

⁴ "Dependent adult" means "any person between the ages of 18 and 64 who has physical or mental limitations which restrict his or her ability to carry out normal activities or to protect his or her rights, including but not limited to persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age. Welf. & Inst. Code §15610(b)(1). The term "Dependent adult" also includes "any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2 and 1250.3 of the Health and Safety Code. Welf. & Inst. Code §15610(b)(2).

⁵ Welf. & Inst. Code §15600(h).

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by Marc Hankin, Esq.
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EADACPA's purpose is "to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults."⁶ EADAPCA attracts attorneys by broadening the remedies available to elders and dependent adults who have suffered egregious abuse. EADACPA (i) requires courts to award attorneys fees and costs to a successful plaintiff, and (ii) allows post-mortem recoveries for the victim's pain and suffering. No less important, (iii) EADAPCA also gives victims of abuse a more expeditious and expert forum by giving the *Probate Court general jurisdiction to hear and decide all aspects of claims* for relief from abuse to an elderly or dependant adults. These new developments give plaintiff's attorneys incentives to file civil suits to enforce the rights of abused elders and dependent adults through injunctive relief, and to obtain damages for violations of those rights. These incentives reach across the board to private, public interest and governmental attorneys.

The impact EADACPA may have on the business world should not be underestimated. This is true even though EADACPA's broadened employer liability is limited to cases where (i) the wrong was perpetrated with recklessness, oppression, fraud or malice *and* (ii) the employer knowingly either participated in or ratified the wrong.⁷

The new law targets a *broadly* defined class of people called *dependent adults* and all people over age 65. The term dependent adult includes "any person between the ages of 18 and 64 who has physical or mental limitations which restrict his or her ability to . . . protect his or her rights." It remains to be seen whether a fairly normal person's neuroses or emotional handicaps are sufficient "physical or mental limitations" to entitle that person to protection as a "dependent adult" within the meaning of EADACPA. A person may be more entitled to membership in the protected class in some situations, such as the purchase of a complicated third mortgage, than in other situations, such as an automobile accident.

EADACPA protects elders and dependent adults from, among other things, an *amorphously* defined wrong called *fiduciary abuse*. The definition of fiduciary abuse

⁶ Welf. & Inst. Code §15600(j).

⁷ Welf. & Inst. Code §15657(c). See the text following footnote 12.

mercifully appears to be a codification of existing law.⁸ But the term may apply to just about any business deal in which a person owes a fiduciary duty to an elder or dependent adult.

2. EADACPA TARGETS THE MOST COMMON FORMS OF ABUSE.

EADACPA requires the court to award attorneys fees and costs if the plaintiff proves by *clear and convincing* evidence that the defendant was guilty of recklessness, oppression, fraud or malice in the commission of physical abuse⁹, neglect or fiduciary abuse.

⁸ As proposed by its proponents, EADACPA was *explicitly* limited to wrongs which are both currently actionable and committed with *malice*. Sen. Bill 679, as amended on April 30, 1991. As a result of a compromise with critics of the Bill, who claimed that EADACPA created new causes of action, Welf. & Inst. Code §15610(f), which defines "fiduciary abuse," became a statutorily defined tort in the chaptered version of the Bill. The newly codified tort seems to add nothing new to existing case law, but only time will tell.

⁹ Physical abuse is defined in Welf. & Inst. Code §15610(c) and "means all of the following:

- (1) Assault, as defined in § 240 of the Penal Code.
- (2) Battery, as defined in § 240 of the Penal Code.
- (3) Assault with a deadly weapon or force likely to produce great bodily injury, as defined by § 245 of the Penal Code.
- (4) Unreasonable physical constraint, or prolonged or continual deprivation of food or water.
- (5) Sexual assault, which means any of the following:
 - (A) Sexual battery, as defined in § 243.4 of the Penal Code.
 - (B) Rape, as defined in § 261 of the Penal Code.
 - (C) Rape in concert, as described in § 264.1 of the Penal Code.
 - (D) Incest, as defined in § 285 of the Penal Code.
 - (E) Sodomy, as defined in § 286 of the Penal Code.
 - (F) Oral copulation, as defined in § 288a of the Penal Code.
 - (G) Penetration of a genital or anal opening by a foreign object, as defined in § 289 of the Penal Code.
- (6) Use of a physical or chemical restraint or psychotropic medication under any of the following conditions:
 - (A) For punishment.
 - (B) For a period significantly beyond that for which the restraint or medication was authorized pursuant to the instructions of a physician licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given.
 - (C) For any purpose not consistent with that authorized by the physician.

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"Physical abuse" is defined in Welfare & Institutions Code §15610(c), and includes among other things (i) assault and (ii) battery, as defined in § 240 of the Penal Code. "Physical abuse" also includes the prolonged or continual deprivation of food or water, and

"the (iv) use of a physical or chemical restraint or psychotropic medication under any of the following conditions:

- (A) For punishment.
- (B) For a *period significantly beyond* that for which the restraint or medication was *authorized* pursuant to the *instructions of a physician* licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given.
- (C) For any purpose not consistent with that authorized by the physician." (emphasis added.)

The italicized language above targets the over-medication of patients and the over-use of "passive restraints" in nursing homes or other health care facilities, *i.e.* tying patients to their beds or wheelchairs.

"Neglect," as defined in Welf. & Inst. Code §15610(d), means:

"the negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care which a reasonable person in a like position would exercise. Neglect includes, but is not limited to, all of the following:

- (1) *Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.*
- (2) *Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.*

- (3) Failure to protect from health and safety hazards.
- (4) *Failure to prevent malnutrition.* (emphasis added.)

Among other things, the definition of "neglect" targets bedsores, malnutrition and other illnesses that are the product of simple neglect by a person or health care facility responsible to provide the "care which a reasonable person in a like position would exercise."

"Fiduciary abuse," as defined in Welf. & Inst. Code §15610(f), "means a situation in which an person who has the care and custody of, or who stands in a position of trust to, and elder or a dependent adult, takes, secretes, or appropriates their money or property, to any use or purpose not in the due and lawful execution of his or her trust."

Fiduciary abuse is broadly defined and far reaching, but presumably is limited to fiduciary abuses that are currently actionable. But the term fiduciary abuse could apply to any type of business relationship in which the wrongdoer "stands in a position of trust to an elder or a dependent adult." The defendant may be an employer, a co-worker, colleague, or vendor of goods or services.

The wrongdoer may be liable for the victim's attorneys fees and costs and for the victim's pain and suffering, if the business person intentionally or recklessly "takes [the victim's] property" or "set[s it] aside or assigns [it] to a particular purpose¹⁰" which is "not in the due and lawful execution of the [elder's or dependent adult's] trust."¹¹

Banks, trust companies, lenders, insurance companies, C.P.A.'s and others, who serve as financial planners, and any other fiduciaries may have to reassess their operating practices in light of their new exposure under EADACPA. Lest these new incentives for lawsuits arouse unnecessary anxiety, it should be noted that an employer is in no way liable

¹⁰ The meaning of the term "appropriate" figures prominently in the definition of "fiduciary abuse." Webster's New Collegiate Dictionary says that "appropriate" means "to set aside or assign to a particular purpose or use; or to take or make use of, without authority or right." (emphasis added.)

¹¹ The quoted language is drawn from the definition of fiduciary abuse set forth in footnote 9 supra.

for a wrong under EADACPA unless (i) an actionable tort took place, (ii) the tort was committed by an agent of the employer with recklessness, oppression, fraud or malice, (iii) both (i) and (ii) are proven to a judge's satisfaction, and not merely a jury's satisfaction, by clear and convincing evidence, and (iv) a managerial agent of the employer knowingly participated in the wrong or ratified it within the meaning of Civil Code §3294(b), or committed some other wrong sufficiently bad to bring it within the punitive damages provisions of §3294(b).

"Fiduciary abuse" obviously targets the growing cottage industry of new "friends" who cut the impaired elders and dependent adults off from friends and family, and then take the victim's property away. Fiduciary abuse may also target *businesses* which "stand in a position of trust" with respect to elders and dependent adults, and who use that trust to appropriate personal or real property from the victim "to any use or purpose not in the due and lawful execution of [that] trust." The usurious loan broker, the phony contractor and the dishonest investment counselor or financial manager will clearly find themselves within the ambit of this definition.

"A typical come-on offers homeowners a 'special' on roofing, carpeting or drapes where the homeowner gets 25% off or free lottery tickets if he signs a contract right away . . . What the potential victim doesn't know is that the unscrupulous contractor is working hand-in-hand with the lender [who convince the elders] to take out loans they can never realistically repay."¹²

There is some possibility that the term "fiduciary abuse" could apply to lawyers, physicians and other service providers who stand in a position of trust to the elder or dependent adult when (i) they "take" a retainer from the elder or dependent adult, and (ii) intentionally fail to perform services which the provider agreed to perform. The plaintiff's argument would be that, if such a service provider uses the retainer for his or her own benefit or recklessly fails to perform, the defendant has "take[n] . . . property to [a] use or purpose not in the due and lawful execution of his or her trust."

Most civil complaints for damages arising from disputes over money include an allegation that the defendant breached a fiduciary duty to the plaintiff. It thus appears likely

¹² Los Angeles Times, Misdeeds of Trust, Real Estate Section, page K9, Sunday, October 20, 1991.

that most lawsuit complaints brought by elders or dependent adults over a financial dispute will now include a request for attorneys fees and costs under EADACPA. For example, this could include, rental disputes, condo conversions, real property purchases, consumer contracts, investor fraud, securities frauds, abuses such as those alleged in the Lincoln Savings controversy, and many employment disputes.

3. ATTORNEYS FEE AWARDS.

EADACPA rewards the victorious plaintiff with attorneys fees and "costs," and says that the term "costs" includes reasonable fees for a conservator's services devoted to the lawsuit. Knowing that the conservator's and the plaintiff's attorney's timeclocks are ticking, abusers have an incentive to resolve disputes promptly under the new law, rather than wage the time honored war of legal attrition.

EADACPA's attorneys' fees provisions are not mere window dressing. EADACPA requires the court to consider three factors when awarding attorneys fees, the first two of which are designed to reward plaintiff's attorneys for standing up to litigious abusers. The third encourages both sides to settle promptly, and penalizes unreasonable litigation. Specifically, EADACPA provides that in determining the amount of attorneys' fees, the court must consider¹³ all relevant factors *specifically including* the following three:¹⁴

- (a) The value of the abuse-related litigation in terms of the quality of life of the elder or dependent adult, and the results obtained,
- (b) Whether the defendant took reasonable and timely steps to determine the likelihood and extent of liability, and

¹³ Section 15657.1 sets out the factors for the determination of attorneys fees allowable under Section 15660. It is obvious from the context that the chaptered version of the bill has a typographical error, and that the reference in §15657.1 should have been to §15657 rather than 15660.

¹⁴ Welf. & Inst. Code §15657.1(a), (b) and (c).

- (c) The reasonableness and timeliness of any written offer in compromise made by a party.

In light of EADACPA's overriding statement of purpose, factor (a) should be interpreted as a factor that can only *enhance* the plaintiff's attorneys fees award, and may *not* be used to *limit* attorneys fees. Thus, factor (a) would be irrelevant in cases where the victim dies before a remedy is obtained, or where a suit is filed after the victim's death, requesting damages newly allowable under §15657(c) for the victim's pain and suffering.

"It is the further intent of the Legislature in adding Article 8.5 (commencing with Section 15657¹⁵) to this chapter to enable interested persons to engage attorneys to take up the cause of abused elderly and dependent adults."¹⁶

EADACPA's purpose is to extend *additional* rewards to lawyers to entice them to take elder and dependent adult abuse cases. The goal of this *Civil Protection Act* is to encourage potential champions to use the civil tort system as a means of protecting the rights of a frequently victimized group of people who have not been adequately protected by the criminal system. EADACPA therefore explicitly provides that the attorneys fee awards are cumulative and supplemental to any damage awards.¹⁷

Fees should be awarded under EADACPA in an amount great enough to sufficiently reward the attorney for the litigation and the risks he or she assumes. Under EADACPA, the heirs and the attorney should not be compelled to enter into a contingency agreement under which they would share the damages recovered. In many cases, the pain and suffering of the victim may be unascertainable.

¹⁵ Due to typographical errors in the chaptered version of the legislation, Chapter 8.5 is erroneously identified as Chapter 6, and section 15657 is erroneously identified as section 15660. These erroneous cross-references will likely be corrected in clean-up legislation in this coming session.

¹⁶ Welf. & Inst. Code §15600(j).

¹⁷ Welf. & Inst. Code §15657(a) and (c).

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The intent of this bill is to discourage the commission of elder abuse by creating *additional* incentives for attorneys to represent the victims of abuse.

Under existing law, the limitations on a victim's recovery, particularly if the victim dies before judgment, discourage attorneys from representing victims because the recovery is so little. Also, complex damage questions arise in cases of neglect where it may be argued that the neglected victim suffered little, if any, harm or injury, because he or she was so disoriented, ill, or infirm. What are the damages if the victim is alive, but not sentient?¹⁸

The goal of EADACPA is to make the abuser pay for the full cost of the legal proceedings that the abuse made necessary. The abuser should pay the full cost of vindicating the victim's rights. The fees that should be enough to entice the attorney to take such a case again, without being compelled to do so merely because of charitable motivation.¹⁹ If there happen to be ascertainable damages for pain and suffering, the abuser should *also* make the victim or the victim's heirs whole by providing compensation for the actual harm caused.

The abuser may complain that an award of significant attorneys fees is inappropriate when there is also a post-mortem award for the victim's pain and suffering. The abuser would contend that the damage award provides more than enough reward for both the heirs and their attorney to share; but a pitifully small sum of unreimbursed medical expenses may be the only damages other than the pain and suffering. The abuser might retort: "So what? The victim is deceased and cannot be made whole. The idea of compensation no longer applies." But EADACPA tells us that, if the court has found *clear and convincing evidence* that the abuse was inflicted *intentionally or recklessly*, there is no public policy which favors

¹⁸ Report for July 16, 1991 hearing by the analyst for the Assembly Subcommittee on the Administration of Justice, Lloyd Connelly, Chairperson, a subcommittee of the Assembly Judiciary Committee.

¹⁹ Welf. & Inst. Code §15600(j).

allowing the abuser to evade paying (i) full compensation for the amount of the harm he or she caused, *plus* (ii) the cost of the legal proceedings which he or she made necessary.

The sponsor argues that existing limitations on damages, and fees, should not apply in such extreme cases.

The legislative history indicates that attorneys fees for the plaintiff's lawyers are to be given financial incentives to cut down on the frequency of unpunished abuse:

In 1988, counties reported 31,004 cases of abuse within the meaning of the Act. In 1989, the total number of reports rose to 42,053. SB 679 creates a private enforcement mechanism that will augment the resources of counties in this regard.

A. The Paragraph (a) Enhancement Factor: Impact on Quality of Life.

If the victim is still living, paragraph (a)²⁰ may be the basis for the award of significant attorneys' fees. For example, if a conservator successfully seeks an injunction requiring a nursing home to clean the beds of incontinent people more frequently to prevent bedsores, the value of such successful litigation will have a great impact on the quality of the plaintiffs' lives, and the reward should reflect that. Similarly, an order requiring a facility to adhere to minimum staffing obligations required by law may have a significant impact on the frequency with which disabled people are given assistance with feeding, and therefore a large impact on their quality of life. The successful attorney's fee award should be large enough to reflect the importance of the feeding in terms of the victim's quality of life.

Although OBRA and other laws²¹ purport to give nursing home residents a private

²⁰ See the text accompanying footnote 14.

²¹ OBRA is codified within the federal Medicare and Medicaid statutes, i.e., 42 U.S.C. 1395, *et seq.*, and 42 U.S.C. 1396, *et seq.*, respectively. The patients' rights provisions occur at 42 U.S.C. 1395i-3(c), and 42 U.S.C. 1396r(c), respectively. OBRA specifically provides that the remedies it provides are "in addition to those otherwise available under

right of action, few attorneys in private practice have found courts to be sufficiently liberal in awarding fees to be attracted into the field of nursing home litigation. The new provision, Paragraph (a) above, which bases an attorneys fee award on the effect of the litigation upon the victim's "quality of life," will put teeth into the law by enticing lawyers to take abuse cases. Successful suits for damages and injunctive relief in the nursing home context will induce remedial changes in the industry, and thereby give a practical meaning to many of the grandiose rights codified in various places.

In the context of *consumer fraud* or *fiduciary abuse*, litigation to recover an elderly person's home or life savings from a con artist comes squarely within paragraph (a) due to the importance of an elder's home and life savings with respect to his or her quality of life. It's usually too late for the elder to earn it again. Attorneys' fee awards for the successful recovery of property should now reflect (i) that importance and (ii) the fact that rewards under Paragraph (a) are subject to the risk and contingency that the plaintiff's attorney can prove his or her case by clear and convincing evidence. Litigation that prevents flagrant financial abusers from profiting from their wrong may deter prospective abusers from starting down the wrong path.

Rewards for successful public interest litigation may be enhanced by these new attorneys fees award factors, but that is yet to be seen. Attorneys fee applications under the private attorney general statute, Code of Civil Procedure §1021.5, "need not represent a tangible asset or a concrete gain but, in some cases, may be recognized simply from the effectuation of a fundamental constitutional or statutory policy."²² It is unclear whether the fees awarded for the effectuation of a fundamental constitutional or statutory policy are generally expected to be in an amount that reflects the value of the litigation in terms of the quality of life of the plaintiff.

State or Federal law and shall not be construed as limiting such other remedies, including any remedy available to an individual at common law." 42 U.S.C. §1395i-3(h)(5); 42 U.S.C. §1396r(h)(8).

There is a private right of action under the California Health & Safety Code Sections 1430 and 1423 against licensed nursing homes for violation "of any statutory provision or rule or regulation relating to the operation or maintenance" of long term health care facilities.

²² See *Serrano v. Priest* (1977) 20 Cal. 3d 25, 41-42, 141 Cal. Rptr. 317, 569 P.2d 1303; *Rich v. City of Benicia* (1979) 98 Cal. App. 3d 428, 433, 159 Cal. Rptr. 473.

Most public interest litigation will not fall squarely within the ambit of Welfare and Institutions Code §15657, and therefore attorneys fees awards for most public interest litigation will be computed under authority prescribed by other statutes. However, the Legislature's approval of the new attorneys' fees factors set out in §15657.1 suggests that those factors may be appropriate ones for a court to consider in making awards for successful public interest litigation. Attorneys who apply for fees may wish to emphasize these new factors which may be supportive in public interest litigation.

B. The Paragraph (b) Enhancement Factor: Defendant Employer Fails to Act Quickly To Find Out Whether Its Agent Committed The Alleged Wrong, and the Extent of the Employer's Obligations to the Victim.

Paragraph (b) of Section 15657.1²³ provides a defendant with an incentive to promptly take "reasonable and timely steps to determine the likelihood and extent of liability," because the plaintiff's attorneys fees will be enhanced if the defendant does not do so. But Paragraph (b) may seem unnecessary since EADACPA applies only when the abuser committed the abuse intentionally or recklessly. After all, a person who inflicted the abuse maliciously does not need to take *any* steps to determine the likelihood and extent of his or her own liability; the liability is obvious.

But an *employer* whose employee may have committed the abuse *does need* to promptly take "reasonable and timely steps to determine the likelihood and extent of liability," and Paragraph (b) encourages the employer to do so. The employer's failure to take those steps may later be cited by the plaintiff's attorney as the basis for an enhanced fee award. This will be particularly true where the guilty employer did not initiate the timely settlement efforts required by paragraph (c). On the other hand, if the defendant employer promptly does what Paragraph (b) requires, the employer's compliance will not reduce the plaintiff's attorney's fee award, but neither will Paragraph (a) enhance it.

Paragraph (b) is important also because employers are *not ipso facto* subjected to EADACPA's special liability for attorneys' fees and costs *whenever* an employee misbehaves. To be liable, the employer must either ratify the employee's misconduct or otherwise bring itself within the standards of Civil Code §3294(b) for the assessment of

²³ See the text accompanying footnote 14 above.

punitive damages against an employer.²⁴ Query whether an employer's failure to obey Section 15657.1(b)'s mandate to take "reasonable and timely steps to determine the likelihood and extent of liability" constitutes a ratification within Civil Code §3294(b)?

C. The Paragraph (c) Factor: The Legislative Policy Favoring Settlement Applies to All Parties, Even the Innocent. A Close Approximation of Justice May Be Good Enough.

Paragraph (c)²⁵ is the sole factor in section 15657 which can serve not only as a possible enhancer of the plaintiff's attorney's fee award, but also as the oasis for a reduction of the award. Assume, for example, that a defendant employer determines that it is liable for an employee's wrong, and makes a prompt and reasonable settlement offer which the plaintiff rejects without making a reasonable and timely counter-proposal. In this case, the plaintiff's attorneys fee award should be *reduced* in order to reflect the waste of the court's and the defendant's time and money caused by the plaintiff's inappropriate response to the offer.

But if the plaintiff makes a reasonable settlement offer and the defendant fails to timely respond with a reasonable counter-proposal, the defendant should be required to pay for the unnecessary waste of time and money imposed on the victim, and pursuant to Paragraph (c), the court should enhance the plaintiff's attorneys fee award. After all, once the plaintiff has proven, by clear and convincing evidence, that the defendant committed the tort recklessly or intentionally, the defendant *should* be forced to pay for all the legal proceedings that were the foreseeable result of that tort. The Legislature has now determined that it is good public policy to make blatantly malicious evildoers pay the cost of all the lawyers and experts that the evil made necessary, and particularly for dragging out the proceedings.

From a purely administrative standpoint, paragraph (c) puts all cases on a sort of "fast track", by encouraging prompt and reasonable settlement offers from either side as discovery progresses. The sanctions embodied in paragraph (c) are merely a logical extension of the approach to settlements already embodied in Code of Civil Procedure §998.

²⁴ See the text following footnote 11.

²⁵ See the text accompanying footnote 14 above.

No longer. Damages for pain and suffering *will be recoverable even after the victim's death*, up to a limit of \$250,000, if the plaintiff satisfies the tests for the recovery of attorneys' fees under EADACPA.³⁰ Contingency cases proving, by clear and convincing evidence, a reckless or intentional infliction of financial or physical harm on the elderly or the frail are now viable. Armed with these incentives, many elders and dependent adults will be able to enforce their own rights, knowing that they will have meaningful access to counsel and to the courthouse door. The possibility for a meaningful post-death recovery means that it is no longer categorically true that the defendant will have less exposure if the abuse was so severe that the victim died from it.

"After all, your mother was suffering from Alzheimer's disease and, although we regret those bedsores and how she died, you must admit that you're both better off now. She's out of her misery [*i.e.* WE DO NOT HAVE TO PAY YOU DAMAGES FOR HER PAIN AND SUFFERING] and you are spared having to visit that virtually comatose woman who really didn't know you anymore [*i.e.* WE DO NOT HAVE TO PAY YOU FOR "WRONGFUL DEATH" BECAUSE YOU DID NOT LOSE MUCH "SOCIETY AND COMFORT"]. It's better to get on with you life, and forget it all now [AND WE'LL CONTINUE TO CARRY ON OUR BUSINESS AS WE HAVE]."

Similarly, people who have perpetrated fiduciary abuses, swindles or other financial harms on the frail and the elderly have had little to fear beyond an order to repay part or all of the booty. The suffering that they caused had little impact on the settlement value of a case.

But now conservators will be able to engage litigation counsel to vindicate the rights of flagrantly abused victims who have lost the ability to hire counsel themselves.

³⁰ See the text accompanying footnote 9. *Both abuse and recklessness or intentional misconduct must be proven by clear and convincing evidence.*

If the victim of abuse dies before the lawsuit ends, the suit may be maintained by the executor or administrator, if there is one, and, if not, by those entitled to the decedent's estate.

6. PROBATE COURT: A FRIENDLY FORUM.

EADACPA encourages the filing of complaints in Probate Court *even while the victim is alive*. This legislative approach was based on the reasoning that the court which appoints conservators sees itself as the protector of the disabled, and is likely to be a friendly forum for abuse victims, and may have greater expertise in handling controversies about whether someone is taking advantage of an incompetent. EADACPA's legislative history recognizes that the Probate Court may also have a greater sensitivity to the problems of the aged and incapacitated.³¹ Controversies to recover property misappropriated from conservatees are typically heard more expeditiously in Probate Court than on the general civil calendar.

Unfortunately, in connection with conservatorships and guardianships, the Probate Court is still a court whose powers "extend only to those matters *expressly conferred by statute* and certain 'incidental powers' necessary to enable probate courts to carry out their express statutory authority."³² Thus, for example, the Probate Court has had no authority to join indispensable third parties in conservatorships.

Although the notion of the Probate department as a court of limited jurisdiction is not yet dead and buried, EADACPA puts another nail in the coffin.³³ Under EADACPA, the

³¹ The Senate Judiciary Committee Report noted: "Proponents have suggested that since probate courts are more familiar with elder and dependent adult issues, they would be more understanding in these types of cases." The Committee report was indecisive about the accuracy of the proponents' suggestion that Probate Court judges tend to be more knowledgeable and expert in these matters. Sen. Jud. Cmte. Rpt., hearing on April 30, 1991.

³² Ross & Moore, CAL. PRAC. GUIDE: PROBATE (TRG 1990); Paragraph 3:52.1.

³³ In the context of decedents' estates (Probate Code §7050) and trust estates (Probate Code §17200), the Probate Court has become a court of general jurisdiction. Conservatorships and guardianships are the sole remaining areas suffering from a lack of general jurisdiction, and sadly those are the sole areas in which the estate belongs to a yet living person who may really need the economy and promptness that general jurisdiction in the Probate Court could provide.

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Probate Court is a court of general jurisdiction over civil actions and proceedings "involving a claim for relief arising out of the abuse of an elderly or dependent adult, *if* a conservator has been appointed for plaintiff prior to the initiation of the action for abuse."³⁴ Thus, if a defendant has committed an abuse against a married conservatee, the conservatee's spouse may bring a suit in Probate Court for the damages suffered by the spouse as a result of the abuse.

The statute limits this broadened jurisdiction to situations in which a conservator was appointed before the "action for abuse" was "initiated." Query when "an action for abuse" has been "initiated?" Must the *general* conservator be appointed prior to the "initiation" of the "action for abuse," or will the appointment of a *temporary* conservator suffice? Three issues must be addressed by counsel seeking Probate Court jurisdiction.

First, does the temporary conservator have the *authority* to commence an action? Unless there is an emergency or the Probate Court specifically grants the temporary conservator the authority to file the action, the answer is clearly no.

Second, competent defense counsel will contend that the Legislature intended to not invest the Probate Court inappropriately with the burden of resolving civil controversies until the Probate Court has come to a firm decision that an ongoing general conservatorship is warranted. The author believes that such an argument is not reasonable and that the Probate Court judge who sees the need for a temporary conservatorship *can* specifically authorize the temporary conservator to file an action. There is no discernable reason to conclude that the Legislature intended to deprive the Probate Court of elder abuse general jurisdiction in cases where the need for protection is so severe that a temporary conservator was appointed on little or no notice, and a general conservator was thereafter appointed.

Third, is an "action for abuse" *initiated* by a request for injunctive relief? Typically a person petitioning for a temporary conservatorship will simultaneously seek a temporary restraining order ("TRO") to prevent the alienation of property obtained from the prospective conservatee. Would that request deprive the Probate Court of general jurisdiction, *i.e.* deprive the court of the power to assess damage awards and attorneys fees against the defendant, or the power to issue remedial injunctive relief against third parties?

³⁴ Welf. & Inst. Code §15657.3(a).

If injunctive relief is the gist of or central to the action, then the answer is clearly *yes* that the action was *initiated* by the request for a temporary restraining order filed *simultaneously* with the request for the appointment of a temporary conservator. The Probate Court would thereafter lack *general* jurisdiction over the controversy because the "action for abuse"³⁵ was initiated by the request for the TRO, which request was *filed* before the temporary conservator was *appointed*.

In emergency cases, experienced counsel may therefore simultaneously prepare (i) a petition for appointment of a temporary conservator, (ii) a request for permission for the temporary conservator to file the request for the TRO, and (iii) a request for the TRO. Assume hypothetically that a victim's situation warrants an ex parte appointment of a temporary conservator. Plaintiff's counsel will get the temporary conservator appointed in the morning, and obtain the authority for the temporary conservator to file a request for the TRO. Immediately *after* the temporary conservator is appointed that morning, the attorney will file the request for the TRO application with the Probate Court and potentially have the TRO granted in the afternoon. Under the Los Angeles Superior Court Probate Policy Memorandum, Paragraph 6:2.03, only 4 hours notice of the TRO hearing must be given.

As a court of general jurisdiction, the Probate Court may hear and decide a complaint for relief from any wrong which is both (i) actionable and (ii) listed in Welfare and Institutions Code §15610. Fiduciary misconduct³⁶ and even *physical* abuses, such as neglect in a nursing home or elsewhere, are now the province of the Probate Court.

Like Sanison unleashed, the Probate Court is no longer partially handcuffed when confronted by financial or physical abuse of its conservatees. Damages,³⁷ attorneys' fees,

³⁵ Welf. & Inst. Code §15657.3(a).

³⁶ See footnote 8 for the definition of "fiduciary abuse."

³⁷ The availability of damages in the Probate Court, it must be admitted, is not entirely a new concept. Effective July 1, 1991, new Probate Code §2619.5 brings into the conservatorship law a double damages provision that has long applied to decedents estate. Section 2619.5 provides: "A person who in bad faith has wrongfully taken, concealed, or disposed of property in the estate of the ward or conservatee is liable for twice the value of the property, recoverable in an action by the guardian or conservator for the benefit of the estate." Unfortunately, the allowability of such double damages is solely in the discretion of the court, and such awards have been extremely rare in the context of decedents estates. The *theoretical* availability of such an award may not provide much fee incentive to the conservatorship litigator. The court may reasonably conclude that the

jurisdiction to join indispensable third parties, and injunctive relief are tools which the Probate Court, in its sound discretion, may now employ to protect its conservatees if the action arises out of the abuse of an elder or dependent adult.³⁸

The breadth of the Probate Court's new jurisdiction defies imagination and will come as a surprise to many. For example, the following abusive practices may now be litigated *in a Probate Court conservatorship proceeding as unfair trade practices*³⁹ for which damages, injunctive relief and attorneys fees enhanced by the new factors⁴⁰ are sought:

- (i) swindles by con artists masquerading as reverse home equity mortgage brokers,
- (ii) phony contractors who prey on the elderly,
- (iii) individuals who take senescent elders' assets, cut the victims off from the rest of the world, and then neglect their health,
- (iv) understaffing, and institutionalized neglectful care in those "bad apple" nursing homes which put the rest of the industry in a bad light,
- (v) trustee embezzlement or other misconduct,⁴¹
- (iv) misuse of a durable power of attorney for property or for health care.⁴²

7. CONCLUSION AND THE FUTURE.

conservatee needs those double damages to pay for his or her medical and custodial care, and that compensating the lawyer is a lower priority. Poor people have accordingly had less access to conservatorships and legal representation, which is a problem that EADACPA seeks to correct.

³⁸ Welf. & Inst. Code §15657.3.

³⁹ Bus. & Prof. Code §17200.

⁴⁰ See the text accompanying footnote 14, *supra*.

⁴¹ Probate Code §17200.

⁴² Section 9 of Chapter 1055 of Statutes of 1991, amending Civil Code §2413. This amendment was initially a Beverly Hills Bar Association resolution conceived and drafted by the author of this article. The resolution was adopted at the 1990 State Bar Conference of Delegates.

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The Legislature's hope is that by providing elders and dependent adults with the means to vindicate their rights in a tort context in the Probate and general civil courts, EADACPA will eventually make litigation unnecessary. It is the hope of the author of this article that EADACPA will be copied in other states, and will serve as a quality control device over the furnishing of services and goods to elders and dependent adults. If abusers know they must pay for the harm they inflict, they may be deterred from wrongdoing. Only time will tell.

EADACPA does nothing to address the problem of intra-family abuse of elders or dependant adults, which abuse is due primarily to caregiver overload in the opinion of the author. The author hopes that the same coalition of lawyers and social service activists, whose efforts are responsible for the enactment of EADACPA, will be successful in their efforts to generate legislation which will create a day care respite center industry. Medicare, Medicaid, tax and other incentives are being considered. The greater availability of good quality day-care respite-center services should reduce the pressure on caregiver family members and thereby reduce the frequency of intra-family abuse. Such supportive services would make it unnecessary for family caregivers to miss work as often, and obviate at least one of the causes of premature institutionalizations.

If a day care respite center industry ultimately arises, EADACPA will hopefully be a part of a network of federal laws ensuring that the quality of the care provided will never drop to the levels that have soiled the image of the nursing home industry.



OLDER PERSONS ACTION GROUP, Inc.

325 E. 3rd. Ave., #300
Anchorage, AK 99501-2606
(907) 276-1059 (Toll free 800-478-1059)
FAX (907) 278-6724

March 26, 1996

RECEIVED

MAR 28 1996

Ans'd.....

Senator Robin Taylor
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Senator Taylor:

The Older Persons Action Group, Inc. urges you to support SB 211. This bill makes it a crime for an individual to abuse or otherwise endanger vulnerable adults entrusted to their care. When law enforcement and judicial officials refuse to prosecute perpetrators of abuse because there is no specific law against these acts, we must take action to preclude repetition of these crimes. SB 211 fulfills this need and we strongly urge you to support this legislation

OPAG also endorses SB 296 which requires a fingerprint background check before certain persons may be employed in a nursing home or assisted living facility. Elderly living in these facilities are particularly vulnerable to criminals who find ready employment in these facilities. The requirement for a fingerprint background check is a prudent management practice to prohibit persons with violent or criminal backgrounds from caring for the elderly. I urge you to support SB 296.

Sincerely,

Sara L. McCullough
President
Board of Directors

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

March 4, 1996

SUBJECT: Sectional Summary of SB 211
(Work Order No. 9-LS1296\C)

TO: Senator Johnny Ellis
Attn: Lynn Kenney

FROM: Gerald P. Luckhaupt *GPL*
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

Sections 1 and 2 of the bill provide technical amendments to AS 11.41.410 - 11.46.420 by recognizing that state agencies other than the Department of Health and Social Services license facilities and programs that mentally incapable persons may be residents of or participants in.

Section 3 of the bill creates new crimes of endangering the welfare of a vulnerable adult,¹ committed by intentionally deserting a vulnerable adult, and criminal neglect of a vulnerable adult,² committed by failing to provide support to a vulnerable adult.

GPL:klb
96-156.klb

¹Punishable as a class C felony. See AS 12.55.125(e).

²Punishable as a class A misdemeanor. See AS 12.55.135.