

Civil Remedies for Victims of Elder Abuse

By Lori A. Stiegel

Introduction

Our client, an older man, deeded his house to his late wife's caregiver in exchange for a promise that he would receive lifelong care. Within two weeks of the transaction, the caregiver threw our client out of the house. My first assignment as a legal services lawyer was to find case law that would support our client's claim for the return of his house. Being a naive young lawyer, I thought "no problem, with all the old people who live in Florida, this must happen all the time. There must be lots of case law." But, there was a problem—while the exploitation of older persons did happen all too often in Florida (and elsewhere), there was almost no case law.¹ Seventeen years later, although the awareness of elder abuse has risen significantly, there is still a dearth of relevant case law.²

There are a number of reasons for the lack of case law on elder abuse, including elderly victims' aversion to bringing lawsuits against their abusers, and lawyers' reluctance to pursue claims on behalf of elderly victims due to financial disincentives, concerns about the victim's ability to testify, and others. This article addresses these reasons, as well as trends in response to them, with the goal of educating crime victims' attorneys about the growing problem of elder abuse, and how to help victims and reduce elder abuse through the civil justice process.

Elder Abuse: An Overview

Generally, the term "elder abuse" is used to incorporate the concepts of abuse, neglect, and exploitation of older

persons. Elder abuse takes many forms, so it is often further delineated by category. Every state and the District of Columbia has a law that defines elder abuse, but the definitions and the categories they encompass vary tremendously. Following a review of pertinent state statutes, the National Center on Elder Abuse developed the following seven categories and descriptions:

- **Physical Abuse** – use of physical force that may result in bodily injury, physical pain, or impairment.
- **Sexual Abuse** – non-consensual sexual contact of any kind.
- **Emotional/Psychological Abuse** – infliction of anguish, pain, or distress through verbal or nonverbal acts.
- **Neglect** – the refusal or failure to fulfill any part of a person's obligations or duties to an elderly person.
- **Abandonment** – the desertion of an elderly person by an individual who has physical custody of the elder or by a person who has assumed responsibility for providing care to the elder.
- **Financial Exploitation** – illegal or improper use of an elder's funds, property, or assets.
- **Self-Neglect** – behavior of an elderly person that threatens his or her health.³

Elder abuse is also defined by the nature of its setting. "Domestic elder

abuse" refers to abuse that takes place in a home or community. "Institutional abuse" occurs in a nursing home or other type of long-term care facility as defined by state law. The statutes and civil remedies sometimes differ for the two settings.

Impact of Elder Abuse on Victims

Abuse may have a particularly devastating impact on older persons, as they generally have fewer options for resolving or avoiding abusive situations due to their age, health, or limited resources. They may be more vulnerable to and harmed by physical abuse due to their physical condition. Older persons may be less able to recover from financial exploitation for a variety of reasons: they may be retired, unable to find a job due to age or illness or the effects of abuse, or have a short remaining life span not allowing time to recoup losses. Housing is often a significant factor. Often, older persons have few housing choices, as many shelters do not accept, provide access for, or suit older persons; senior housing complexes usually have long waiting lists; and nursing homes—often a source of problems—are not perceived as a viable option.

In addition to the physical and financial consequences of elder abuse, victims suffer profound psychological and emotional devastation. Though many crime victims experience trauma, the trauma of elder abuse is compounded by the fact that, by definition, crimes are committed by family members, caregivers, trusted friends, neighbors, or fiduciaries.

Generally, our current generation of older people fears going to court.

Moreover, many older persons have extreme reluctance to take legal action against family members for whom they feel love or responsibility, caregivers upon whom they may be dependent, and "friends," neighbors, or fiduciaries in whom they placed their trust.

Common Law Remedies for Elder Abuse

If a victim can overcome the reluctance and fear of going to court, there are common law civil or equitable remedies such as restitution, constructive trusts, and compensatory damages that may be sought from a perpetrator of elder abuse in order to make the victim whole. These would be obtained through lawsuits for:

- assault and battery;
- breach of fiduciary duty;
- conversion;
- fraud;
- false imprisonment; or
- negligence.

Other traditional civil actions, such as petitions for a guardian or conservator, or for a divorce or legal separation, may be used to prevent further abuse, but such actions will not recover victims' losses.

Challenges Associated with Common Law Remedies

Pursuit of common law civil and equitable remedies can be challenging to victims and their attorneys and advocates for a number of reasons.

- The slow pace and customary delays of the legal process are particularly onerous to older persons in general and to those who have been abused in particular.⁴ There is always a risk that the victim will become incapacitated or die prior to trial.
- Elder abuse cases may be difficult to prove. Physical evidence may be unavailable due to delays or failures in recognizing the cause of the victim's

problem. Witnesses may be unavailable as well. The victim's capacity to testify may be in question, either because the capacity was lacking at the time of the abuse or because it has diminished or been lost in the intervening period. Many financial and sexual abuse cases raise the complex issue of undue influence. Qualified expert witnesses may be difficult to find.

- Many elder abuse cases may not be financially viable for the victim or the lawyer. Compensatory damages may be low given the victim's life expectancy, or physical, mental, or employment status. Attorney's fees may not be available pursuant to state law. Punitive damages may not be awarded if the facts of the case do not support their prerequisites or compensatory damages. However, in lawsuits about the quality of care delivered in nursing homes, the trend is toward large awards for punitive damages.⁵

- The abuser may not have the resources to satisfy a judgment. Collection of the judgment may be more feasible if the abuse was committed in an institutional setting or by a fiduciary.

New Statutes May Help Lawyers Overcome These Challenges

Statutory causes of action of relatively recent origin may prove more useful than common law claims for lawyers whose clients are victims of elder abuse.

- In some states, assets that were exploited from an older victim may be frozen to prevent dissipation.

- Civil orders of protection may be available to elder abuse victims, many of whom are actually older victims of domestic violence by their spouses. Increasingly, states are expanding their definition of domestic violence to include other forms of family violence against the elderly, such as that committed by an adult child or grandchild.

- Consumer protection laws may provide a cause of action against individuals or companies that financially exploit older persons. Nursing homes have been subject to such claims for failure to provide the care that they advertised and contracted to offer.

- False Claims Acts at the federal and state level may be appropriate in

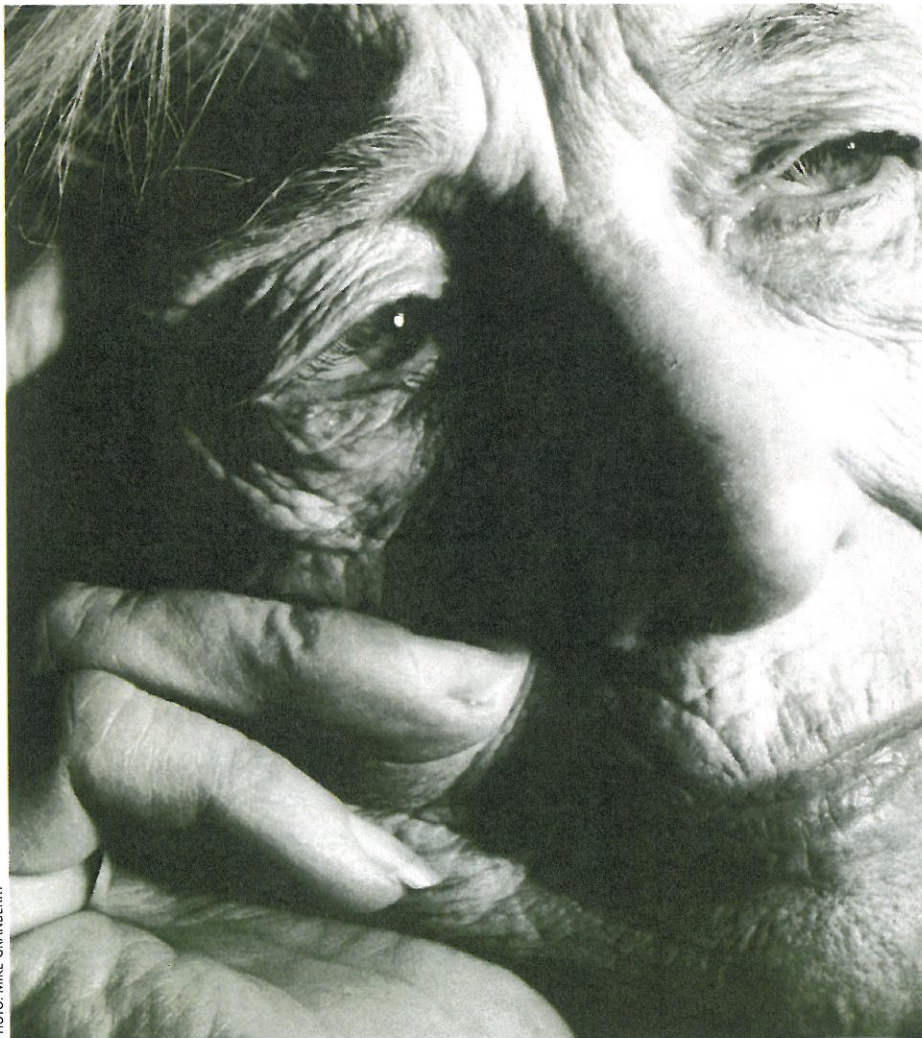


PHOTO: MIKE GRANBERRY

CAPACITY: SPECIAL CONSIDERATIONS WHEN REPRESENTING ELDER CLIENTS

By Jeffrey R. Dion

Attorneys who represent elderly crime victims in civil actions must consider how issues of capacity may complicate litigation. A review of basic issues prior to filing suit will enable attorneys to avoid both technical errors and potential ethical conflicts. These issues vary by jurisdiction and counsel should consult the controlling statutory authority in their state. The following are offered as general guidelines.

Does the client have sufficient mental capacity?

As early in the litigation as possible, attorneys should determine whether there is any suggestion of a lack of mental capacity, particularly in cases where the attorney is contacted by the victim's family, or when the victim is in a nursing home. If the victim is unable to provide basic information on the facts of the case or if there is any indication of dementia, the attorney should inquire whether the victim has the requisite mental capacity to bring the case or if a family member has been granted the legal authority to act on the victim's behalf. Failure to do so can create potentially serious pitfalls for the case. Even if the victim has not been adjudicated incompetent, any evidence of dementia or diminished capacity can be exploited by the defense. Capacity must be established at the outset.

Roadblocks created by lack of capacity

A plaintiff who lacks the mental capacity to handle her own affairs is unable to perform the most basic of functions needed to prosecute a claim for damages. She will be unable to execute answers to interrogatories, offer sworn testimony at deposition, or authorize the release of medical records. If the plaintiff fails to produce valid responses to requests for discovery, the defendant has a good chance of having the case dismissed. Moreover, a person suffering from diminished mental capacity probably lacks the legal ability to enter into a contract. This could call into question the validity of the retainer agreement under which the attorney is working. If the attorney entered into an agreement with anyone other than the victim, the agreement should state explicitly what legal authority the signatory has to act on the victim's behalf and clearly identify the person with final decision-making authority.

Representative Suits


When an elderly victim lacks the capacity to bring a civil action on his own behalf, a family member or other person can file suit as a representative of the victim. There are several methods for others to acquire the legal authority to remedy a lack of capacity and allow the litigation to move forward.

- **Power of Attorney** – if prior to suffering diminished mental capacity, the victim executed a durable power of attorney authorizing a spouse or other individual to act on his behalf in the event of any such incapacity, the litigation may proceed. Once the victim has begun to experience diminished mental capacity, this method is no longer an option.

- **Guardianship** – if the victim is of diminished capacity, she may need to be adjudicated incompetent and have a guardian appointed prior to filing suit. In many states, neither a power of attorney nor guardianship is required to have a family member admitted into a nursing facility, so counsel should not assume that the person who had the victim placed in a nursing home has the ability to bring a civil action on the victim's behalf, absent some other authority.

- **Personal Representative** – often a family member can bring an action in her own name as the incompetent victim's "personal representative" or "next friend." Some jurisdictions allow individuals to file as personal representative with leave of the court, without first obtaining guardianship or a power of attorney. Other jurisdictions require leave of the court to proceed as a personal representative, even if that individual has been appointed guardian or holds a power of attorney for the victim.

Conclusion

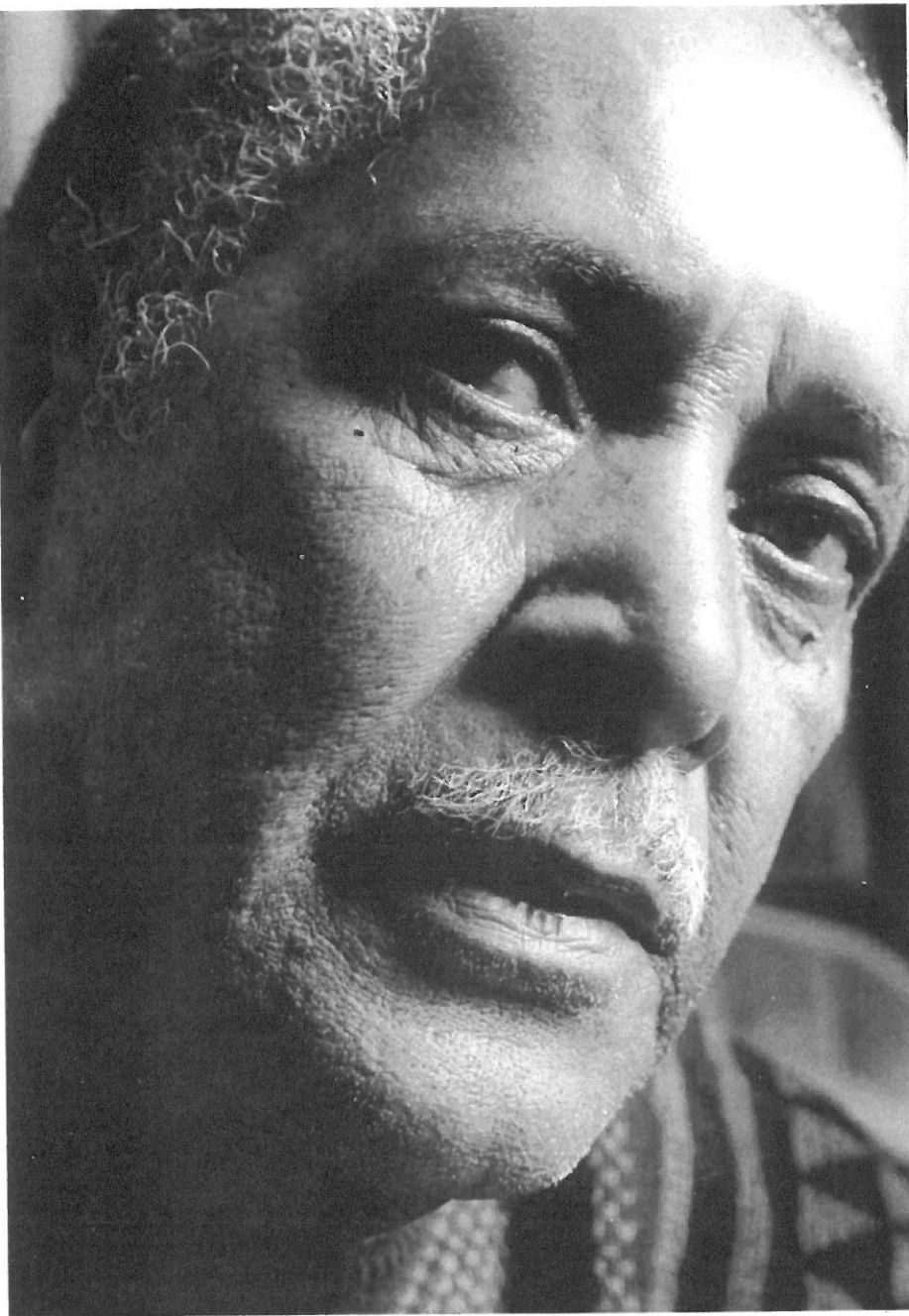
By making an initial assessment of capacity issues before beginning the representation of an elderly victim, an attorney can take the necessary steps to ensure that issues of diminished capacity will not interfere with his client's pursuit of civil justice. 

instances where nursing homes failed to provide the care for which they are reimbursed by the government. The U.S. Attorney's Office in Philadelphia has entered into two settlements in cases against nursing homes, for \$100,000 and \$500,000 respectively, in addition to

requirements for facility monitoring and significant quality of care improvements.⁶

- Several states have enacted special elder abuse statutes that are useful in overcoming some of the challenges faced when common law remedies are sought. Perhaps best known is California's "Elder

and Dependent Adult Civil Protection Act" (EADACPA).⁷ Its intent is to "enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults."⁸ The law establishes a civil remedy for physical abuse, neglect, and fiduciary



abuse; authorizes the award of attorney's fees and costs and punitive damages under certain circumstances; and allows a cause of action to survive if the victim dies.⁹ Arizona's adult protective services statute includes a civil remedy and authorizes actual, consequential, and punitive damages, attorney's fees and costs, and divestiture.¹⁰ Illinois law authorizes treble damages for the losses incurred by an "elderly or disabled person" as a result of financial exploitation when an exploiter is criminally charged and fails or refuses to return the victim's property following demand by

the victim or the victim's legal representative.¹¹ Attorney's fees and court costs are also authorized. Maine's "Improvident Transfers of Title" statute creates a presumption that a "transfer of real estate or major transfer of personal property or money for less than full consideration by an elderly person who is dependent on others to a person with whom the elderly dependent person has a confidential or fiduciary relationship" was the result of undue influence unless the grantor was represented by an independent counsel for the transaction. It also authorizes a civil action for relief.¹²

Another important trend involves the revision of court procedures to enhance the access of elder abuse victims to the court system. Whether by legislation or court rule, states have begun to examine and enact procedural options, such as expedited trials, allowing victim testimony in a less confrontational setting, and more readily admitting evidence from collateral sources if the victim's capacity is an issue.¹³

Conclusion

Interest in the pursuit of legal remedies for elder abuse is expanding as adult protective services workers, advocates for older persons, judges, prosecutors, law enforcement officers, academics, and others recognize that traditional protective services do not prevent or fully address elder abuse. Opportunities abound for creative civil litigators to do well and do good by suing perpetrators of elder abuse for the damages they have caused to their victims. ❧

Lori A. Stiegel, Associate Staff Director of the ABA Commission on Legal Problems of the Elderly, has authored "Elder Abuse in the State Courts—Three Curricula for Judges and Court Staff" and "Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse." She is a director of the National Committee for the Prevention of Elder Abuse, a member of the District of Columbia Commission on Violence Against Women, and licensed in Florida, Georgia, and Washington, DC.

1. After many hours of research, I found one case. It held that in a factual situation such as our client had experienced, the caregiver would be presumed to have acted fraudulently. The caregiver did not overcome that presumption, and our client regained the title to his home.
2. The National Center on Elder Abuse reports that the 241,000 reported cases of domestic elder abuse in 1994 represent a 106% increase over the number of reported cases in 1986. Most cases of domestic elder abuse are not reported, and there are no statistics about the incidence of elder abuse in institutional settings. National Center on Elder Abuse, "Domestic Elder Abuse Information Series #1—Types & Numbers of Domestic Elder Abuse Cases," www.gwjapan.com/NCEA/basic/p1.html.
3. *Ibid.*
4. Mark S. Lachs et al., "The Mortality of Elder Mistreatment," 280 JAMA 428-432 (1998).
5. Michael Higgins, "Getting Sued by Seniors," ABA Journal (December 1998), citing a February 1998 Florida jury award of \$6.3 million to the family of a nursing home resident who wandered from the home and drowned and a March 1998 award of \$95 million (reduced to \$3 million) to a California nursing home resident who fell and broke her hip and shoulder.
6. United States v. GMS Management-Tucker, Inc. et al., Civ. Action No. 96-271 (ED Pa. 1996); United States v. Chester Care Center et al., Civ. Action No. 98-CV-139 (ED Pa. 1998).
7. Cal. Welf. & Inst. Code §15600 et seq.
8. Cal. Welf. & Inst. Code §15600(j).
9. Cal. Welf. & Inst. Code §15657-15657.3.
10. Ariz. Rev. Stat. §46-455.
11. 720 Ill. Comp. Stat. Ann. 5/16-1.3.
12. Me. Rev. Stat. Ann. tit. 33, § 1022-1025.
13. Stiegel, *Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse* (ABA 1995).