

# ELDER FINANCIAL EXPLOITATION AND THE --- CRIMINAL JUSTICE SYSTEM

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# Agenda

- Elder Financial Exploitation
  - New reality
  - Statistics
  - Crimes in Washington
  - Theories under which we prosecute
- What You Can Do to Help
- Some Basic Info on the Criminal Justice System

# Elder Financial Exploitation

# New Reality

- How you respond to a case often directly affects what happens to it in CJS
- Increased awareness of elder abuse by CJS
- New laws, crimes, and procedures
- CJS is no longer stuck in its silo
- Increased expectations by CJS of cooperation with, assistance from social service agencies and health care providers

# How can criminal justice involvement help your clients?

- Increases incentive of perpetrator to undergo treatment
- Can protect client from further abuse/exploitation
- Brings resources of CJS to your clients:
  - Restitution
  - Victim advocacy (in some cases)
  - Court supervision of offender
  - Offender counseling and treatment
  - No Contact Orders

# Challenges Posed to You and Your Client by Criminal Justice System Involvement

- May not be what the client wants
- Time consuming
- Client may have to testify (if able)
- You may have to testify

# What is Financial Exploitation?

- Illegal or improper use of an older adult's funds, property or assets

# Elder Financial Exploitation

- Most common form of elder abuse reported to us
- Often co-occurring with neglect, physical violence, sexual abuse
- Very often leads to significant declines in victim's physical and mental health
- Victims often left with nothing



- Seniors lose a total of approximately \$36 billion per year to financial exploitation

- True Link Report on Elder Financial Abuse

- On average, an individual victim loses \$120,300

- AARP BankSafe Initiative: A Comprehensive Approach to Better Serving and Protecting Consumers (Jan 2016)

- Nearly 1 in 5 elders has been the victim of financial abuse

- Investor Protection Trust

- [http://www.investorprotection.org/downloads/IPT\\_EIFFE\\_Medical\\_Survey\\_News\\_Release\\_03-22-16.pdf](http://www.investorprotection.org/downloads/IPT_EIFFE_Medical_Survey_News_Release_03-22-16.pdf)

- Elder financial exploitation and caregiver neglect are tied for the highest mortality rate (lowest survival) of all forms of elder abuse, including physical abuse

- Journal of Elder Abuse & Neglect Vol 28 2016 Issue 2

# Financial Exploitation

## Common Washington Crimes

- **Theft from a Vulnerable Adult**
  - Theft of \$5,000 or over
  - 6-year statute of limitations
  - Higher penalties
  - For crimes occurring after *7/27/2017*
- **Identity Theft of a Vulnerable Adult**
  - No minimum amount of theft
  - 6-year statute of limitations
  - Higher penalties

# Financial Exploitation

## Common Washington Crimes

- Theft 1 (over \$5,000) and Theft 2 (over \$750)
  - Felonies
- Theft 3 (\$750 or less)
  - Gross Misdemeanor
- Identity Theft 1 and 2
- Forgery
- Mortgage Fraud

# Theories Under Which We Prosecute Theft

- Theft by Deception
  - Perpetrator lied to victim
  - Victim gave assets to perpetrator based on those lies
  - “Theft by color or aid of deception”
- Theft by Embezzlement
  - Perpetrator was legitimately in charge of victim’s assets (**Power of Attorney, guardian**, accountant, billpayer)
  - Used assets for themselves rather than for victim’s benefit
  - “Exerting unauthorized control”

# Powers of Attorney and Guardianships

- **Power of Attorney**

- An instrument which delegates authority to make decisions or financial management to another
- No court oversight

- **Guardianship**

- A court order granting certain powers to a family member, other individual, governmental agency, or institution to control the affairs of an incapacitated person
- Court oversight

# Powers of Attorney and Guardianships

- Create fiduciary duty on part of attorney-in-fact, guardian
  - Attorney-in-fact cannot gift to themselves beyond gifting provision set out in PoA document
  - Expenditures must be for benefit of incapacitated/elderly person
- Abuse of PoA or Guardianship is Theft



# Theories Under Which We Prosecute Theft

- Theft by Taking
  - Taking was without victim's consent or knowledge; or
  - Victim **lacked capacity to consent** to give perpetrator their assets

# Financial Capacity

- One of the first abilities to decline as cognitive impairment and early dementia occur
  - Triebel et al, 2009
- Declining skills are often detectable before a diagnosis of dementia
- Health care and other professionals often miss declining capacity in patients due to lack of training or inadequate screening tools (MMSE)
  - Better to use SLUMS, MOKA, or other screening tool that includes assessment of executive function impairment
  - Even better to obtain full evaluation
- We must show defendant knew victim lacked capacity

# Theories Under Which We Prosecute Theft

- Theft by **Undue Influence**
  - Perpetrator obtained victim's consent through process of manipulation, isolation, and deception
  - There is no prong of "theft by undue influence" in the RCW, so we typically charge these types of cases as theft by deception

# What is Undue Influence?

- Method used by perpetrator to obtain “consent” from victim in order to commit crime of theft
- Substitution of perpetrator’s will for the true desires of victim – similar to brainwashing
- Victim “consents” to transactions based on what perpetrator wants – not in victim’s best interest

# What makes a person susceptible to undue influence?

- Physical disabilities
- Dementia or other cognitive impairment
- Adverse life events
- Difficulty speaking English
- Isolation or dependence
- Lack of financial expertise
- Loneliness, fatigue or fear
- Trauma

# Consent

- Consent is most common defense raised in elder financial exploitation cases
  - “I was the only one there for her. She wanted me to have all of her money.”
  - “This was a gift to me for all I’ve done for her.”
  - “She didn’t have much time left. She wanted to give all of her money away.”

# Consent

- Consent is not valid if:
  - Obtained by deception
  - Obtained by undue influence
  - Victim lacked mental capacity

# Joint Bank Accounts

- The funds in a joint bank account belong to the person who deposited them, unless clear evidence exists to the contrary
  - RCW 30.22.100
- Taking funds from a joint account where you have not deposited any money into the account is likely theft



# Red Flags of Elder Financial Exploitation

- Sudden changes in spending/banking habits
- Suspicious ATM withdrawals
- Unpaid bills
- Purchases of items not needed by or appropriate for elder
- Sudden interest in elder by previously uninvolved family member or new friend

# Red Flags of Elder Financial Exploitation

- Sudden or unexplained changes to elder's legal/financial documents:
  - Joint account holder
  - Will
  - Power of Attorney
  - Deeds to property
- Decline in elder's hygiene
- Elder fails to make appointments, participate in social events

# Some Factors that Make Prosecution of Financial Exploitation More Likely

- Clear fiduciary duty on part of perpetrator
- Dramatic spending changes as result of exploitation
- Significant impact on elder's assets / estate
- Statements made by victim that are inconsistent with perpetrator's story
- Witnessed interactions between victim and perpetrator that raise concerns

# What You Can Do to Help

- Consider:
  - Abuse, neglect, or exploitation as a possible explanation for what you are seeing

# What You Can Do to Help

- **Report**

- To APS, and
- To Law Enforcement

- **Document**

- Any red flags you witnessed
- Your concerns about the situation
- Statements made by the perpetrator that you think are relevant – in quotes
- Statements made by the victim – in quotes
- Victim or suspect behavior that concerns you
- Environmental signs of exploitation

# A Few Reminders About Documentation

- Complete
  - Will it refresh my memory in 18 months?
  - Will I look professional?
- Objective
  - Facts, not conclusions or “emotional content”
  - Avoid victim blaming statements or “buying into” justification or minimization of conduct
- No labeling
  - Will I look open minded and neutral or seem partisan?

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- Thanks to Candace Heisler, NCALL

# Some Basic Information on the CJS



# “Beyond a Reasonable Doubt”

- A defendant in a criminal case is presumed to be innocent.
- This presumption requires that the prosecution prove him/her guilty beyond a reasonable doubt
- Proof beyond a reasonable doubt is proof that leaves you with an abiding belief that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

# BURDENS OF PROOF

**Beyond a Reasonable Doubt**

Requires elimination of every reasonable doubt.

**Clear and Convincing Evidence**

Firm belief or conviction.

**Preponderance**

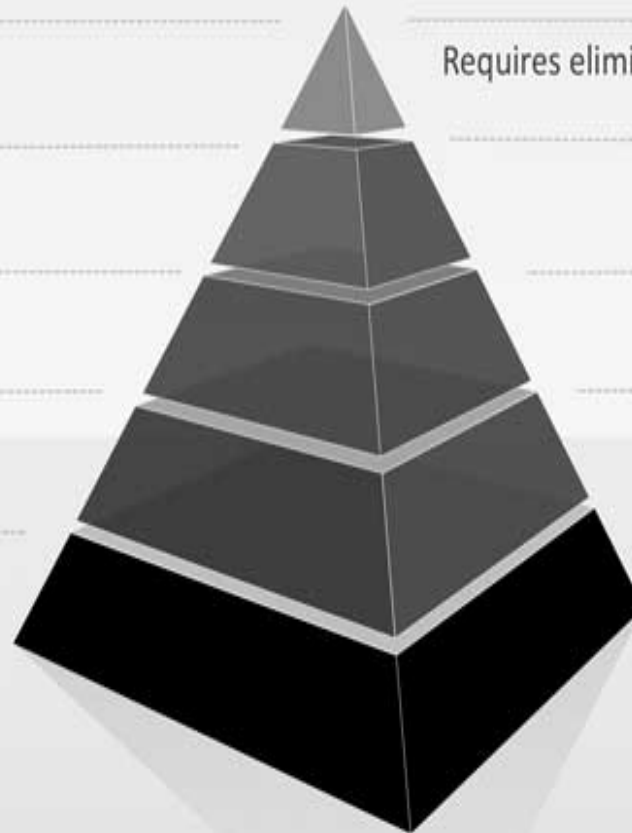
More likely than not.

**Probable Cause**

Facts and circumstances lead an ordinary person to believe.

**Reasonable Suspicion**

Specific and articulable facts.



VARGHESE  
SUMMERSETT

# What Does the Defendant Have To Prove or Show?

- NOTHING! Remember, the defendant is presumed innocent, and that presumption continues throughout the process until it is overcome by the evidence (either plea or verdict).
- Cannot shift burden of proof to the defendant to explain away or disprove what the prosecution has shown or claimed
- Prosecution cannot call defendant as a witness to establish part of the case

# THE LIFE OF A FELONY CASE

