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Averting Financial Exploitation and Undue Influence through Legislation

by Kathy Pryor, JD
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Objectives

1. Explain what financial exploitation is.
2. Examine the elements of undue influence through case studies.
3. Consider the reasons undue influence is so difficult to address legislatively.

Background

Financial exploitation is the illegal or improper use of someone else’s money or belongings for the user’s own personal benefit. Virginia Code § 63.2-100 defines “adult exploitation” as “the illegal use of an incapacitated adult or his resources for another’s profit or advantage.” In fiscal year 2014, Virginia’s Adult Protective Services substantiated 1,079 complaints of financial exploitation. Too often, exploitation occurs at the hands of a trusted family member, caregiver, agent under a power of attorney, or others abusing a position of trust. For many years, advocates and legislators have attempted to craft laws which would deter those who would victimize vulnerable Virginians through new or enhanced criminal penalties, or which would improve the ability of victims to recover their lost resources from the exploiter through the civil courts.

Existing criminal law does not protect the victim who has capacity but is, nonetheless, manipulated or induced to act in ways that she would not otherwise act by someone in a position of influence or trust who takes advantage of the victim’s vulnerability and trust in order to obtain the victim’s money or property. The civil law does address this problem, but cases are difficult and time-consuming to bring and it is often difficult to find an attorney willing to represent these victims. The problem, often referred to as “undue influence,” has been a particularly ‘difficult nut to crack’ legislatively. A victim’s competency or capacity, that is, her ability to understand the nature and consequences of whatever document she is signing or whatever transaction she is entering into, may be fairly clear. Undue influence, however, is far less precise. Technically, the victim may understand what she is doing, but she may act out of fear of the consequences of not acting as the exploiter wishes or out of trust that the exploiter must be acting in her best interests.

When the exploiter is a close family member, the line between receipt of a “gift” and a criminal or improper act of exploitation becomes blurred and difficult to prove. A victim’s ambivalence about bringing criminal charges against a beloved relative or trusted advisor makes criminal charges challenging to sustain and prove. In addition, legislators are especially reluctant to pass laws which create a new crime or enhanced criminal penalties in situations where the lines between a good actor and a bad one are indistinct and subjective.

Case Study #1

One month after the sudden death of his wife of more than 50 years, Mr. Jones’ daughter Sarah offers to move in with her father and care for...
him, if he would first deed his home to her. Sarah had helped her parents with transportation to the doctors and with their finances for the last five years because his vision had deteriorated due to glaucoma. Mr. Jones, age 83, had depended on his wife for his care for several years. In addition to glaucoma, he has breathing difficulties from emphysema, severe arthritis that limits his ability to get around, and he uses a wheelchair. Before moving in, Sarah insists that her father go with her to her attorney to have a deed drawn up. Fearful of living alone, he agrees and signs the deed. Six months later, Mr. Jones contacts an attorney after being served with an unlawful detainer: his daughter Sarah is trying to evict him.

Case Study #2

Mrs. Smith, an 85 year old widow, goes to live with her son and his wife because she is no longer able to live independently in her own home. She is unable to read or write; she has completely lost sight in one eye and has lost several of her toes to diabetes; and she suffers with high blood pressure. She cannot walk, prepare her own meals, or leave the house without assistance, and she is totally dependent upon her son and daughter-in-law for food, transportation, medical care, and many other essential and non-essential needs. Mrs. Smith owned her own home and had paid it off before she moved in with her son. While she was living in her son’s home, he asked her to sign a paper which he said was needed so that he and his wife could handle her checks and help her pay her bills. No one read the document to Mrs. Smith and she signed with an ‘X’, not realizing that she was in fact signing over the deed to her home to her son and daughter-in-law. Only several months later when her son began talking about boarding up her home did Mrs. Smith learn that her home was no longer in her name but was in her son and daughter-in-law’s names. While she fully intended to leave her son the home at her death (and had drawn up a will to that effect), she never intended to convey the home to him during her lifetime.

Common Elements of Undue Influence:

The cases of Mr. Jones and Mrs. Smith demonstrate some elements that are often present in financial exploitation cases in general, and in undue influence cases in particular. These include:

• Both victims had one or more serious physical or mental impairments. Mr. Jones had also experienced the sudden significant loss of his wife just a few weeks before his daughter insisted that he sign over the deed to his home. Both victims had limited education and restricted vision, making them even more vulnerable to exploitation.
• Both victims were fully dependent upon the “exploiter” to supply their basic needs. Each exploiter was in a unique position to isolate the victim, since the parent lived with and depended upon the exploiter to provide transportation to leave the house.
• In each case, the victim had a special relationship with the exploiter. Both victims trusted their exploiter and relied upon him or her to act in the victim’s best interests. Both exploiters, then, held a position of trust with respect to the parent-victim.
• In each case, the exploiter took advantage of that trust and dependency to manipulate the parent-victim into signing a deed which the parent would not otherwise have signed, to the benefit of the exploiter and to the detriment of the parent-victim.

Legislative Approaches: “The Art of the Possible”

A. Making Financial Institutions Mandated Reporters

For many years up until 2009, advocates’ primary approach to the problem of financial exploitation was to seek a law to make financial institutions mandated reporters, requiring them to report suspected financial exploitation to Adult Protective Services. Every year, the banking lobby strenuously opposed these bills, claiming that protection of their customers’ privacy precluded them from reporting suspected financial exploitation. The bills died in committee every year, despite the support of such heavy hitters as AARP.

Eventually advocates turned to other, less strongly opposed measures which would offer either a “stick,” namely, enhanced criminal penalties against the exploiters, or a “carrot,” enhancing the ability of victims to recover their lost assets civilly by improved access to the courts. Both approaches have met with some success, though never swiftly or without compromise. Legislation is, if anything, the “art of the possible.”
**B. Criminal Penalties**

Starting in 2009, advocates turned to fighting financial exploitation by seeking to deter exploiters through imposition of tougher criminal sanctions. Some bills approached the problem by setting out enhanced penalties when the victim of certain crimes, such as larceny or identity theft, was an adult over age 60 or incapacitated and the perpetrator had reason to know that the victim was incapacitated or older. Year after year, despite patrons from both parties, these bills failed to pass.

Another approach, more to the liking of many elder rights advocates, would create a crime of financial exploitation when a person knowingly, by deception, intimidation, undue influence, coercion, harassment, duress, or misrepresentation, obtained an elderly or vulnerable adult’s property with the intent to deprive the adult of its use. Violation by a caregiver or a person with a fiduciary relationship to the vulnerable adult would carry an increased penalty. Though supported by many advocacy groups, these bills generally died in the House Courts of Justice committee, primarily because legislators could always envision an outlier situation where a well-meaning relative might be charged criminally under the proposed law, e.g., an adult child takes away the parent’s car because the parent is no longer able to drive safely; an adult child closes the mother’s bank account and prevents her access to the new account because the mother, suffering with dementia, has been the victim of numerous scams and financial manipulation. In 2012, such a bill passed the Senate unopposed and actually was reported out of House Courts, yet still failed to emerge from the House Appropriations committee and, therefore, failed to become law, despite bi-partisan co-patrons, widespread support, the backing of the Attorney General’s office, and money in the Governor’s budget to offset the fiscal impact.

Finally, in 2013 a narrower, some would say watered-down, approach was taken. Instead of trying to address the problem of undue influence and vulnerable victims who are manipulated into giving away property against their will, the 2013 bill addressed the problem of crimes against victims who are actually mentally incapacitated. The proposed new Code §18.2-178.1 would make it unlawful for someone who knows or should know that a person suffers with mental incapacity to take advantage of that mental incapacity in order to deprive the mentally incapacitated person of something of value. “Mental incapacity” was defined as the condition of the victim at the time of the offense which prevents the person from understanding the nature and consequences of the transaction or disposition of money or other property. This bill, again with multiple bi-partisan patrons, unanimously passed both Senate and House, was signed by the Governor, and became law July 1, 2013. Significantly, the new law does not address the circumstance of a person who does understand the nature and consequences of the transaction, but who is manipulated and unduly influenced by a trusted person who takes advantage of his vulnerable state to push him to take an action he would not otherwise take. But it does provide prosecutors with another tool to take action against those who prey upon those who are vulnerable due to mental incapacity. Legislation is the art of the possible.

**C. Civil Remedies**

Even as legislators and advocates were seeking improved criminal penalties to deter exploitation and punish exploiters, there was awareness that not all perpetrators can be found, charged, and convicted and that not all victims actually want their exploiter to go to jail. Often, all the victim wants is to get back what was taken away and to put the betrayal of trust in the past and move on.

To address the civil side of the problem, the Virginia Vulnerable Adult Protection Act was proposed in 2013. This bill would prohibit an individual in a position of trust to a vulnerable adult from using the vulnerable adult’s property or assets for his own purposes. An individual who violated this act would be liable for actual and possibly punitive damages and could be barred from inheriting from the vulnerable adult and from serving in a fiduciary capacity to the vulnerable adult. The bill sought to impose a duty on responsible persons in a position of trust to use the vulnerable adult’s assets solely for the benefit of the vulnerable adult; to enhance recovery by the vulnerable adult from the exploiter; to deter exploitation by responsible persons; and to prevent further loss of assets by enabling a court to revoke any property disposition or fiduciary nomination. Because it was a short session of
the General Assembly which provided less time to negotiate substantive language changes and possibly because the criminal financial exploitation bill (which was ultimately successful) was moving through the same committee at the same time, the full House Courts committee tabled this bill despite the subcommittee’s recommendation to report it out.

In the interim between legislative sessions, advocates considered other civil remedy approaches that might pass General Assembly muster. A law which had been in effect in Maine for more than 25 years came to our attention and we drafted a bill based upon that law and began to vet it among elder law advocates. This bill was intended to address the situation where an older person, who is not incapacitated but is dependent on another, conveys real estate or a significant portion of his estate to a person in a fiduciary or confidential relationship with him. The Maine law, and our proposed bill, would have created a statutory presumption of undue influence if five elements were proven: (1) that the victim is over 60; (2) and is wholly or partially dependent on one or more persons for care or support because the elderly person is suffering from a significant limitation in mobility, vision, hearing, emotional or mental function, or the ability to read or write, or is suffering or recovering from a major illness or major surgery; (3) the dependent elder transfers for less than full consideration any real estate or more than 10% of the dependent elder’s estate; (4) the transfer is to a person with whom the dependent elder has a confidential or fiduciary relationship, including a family relationship, a fiduciary, a health care provider, an attorney, minister, caregiver, friend or neighbor; and (5) occurs without independent counsel to represent only the dependent elder’s interests. If those five elements are proven, a presumption of undue influence arises and, if not rebutted by the transferee, the dependent elder can reverse the transfer and potentially obtain rescission of a deed, actual damages, attorney’s fees and costs, and in some circumstances punitive damages.

While we were vetting this bill, the Virginia Supreme Court rendered an opinion in the case of Ayers v. Shaffer which clarified Virginia’s undue influence legal standard. The Supreme Court held that, in Virginia, a person can prove undue influence either by showing great weakness of mind and that the defendant obtained the bargain for grossly inadequate consideration or under other suspicious circumstances OR by showing that a confidential relationship existed between the parties at the time of the transaction beneficial to the defendant (even in the absence of other suspicious circumstances). In other words, it is not necessary to prove both that the defendant overcame the will of the victim because of her weakness of mind and that the defendant took advantage of a confidential relationship. With this case decision, it became clear that pursuing the bill based on the Maine law might simply confuse Virginia’s undue influence standard and might actually serve to make recovery by victims more not less difficult.

After Ayers v. Shaffer and with the 2014 General Assembly session fast approaching, advocates regrouped and decided upon a very targeted approach to help victims recover their lost assets by simply enabling them to recover from the exploiter reasonable attorney’s fees and costs when the victim could prove that a deed or other instrument was obtained by fraud or undue influence. The hope was that such a targeted approach would be achievable and that a law to that effect would encourage more private attorneys to take these difficult, time-consuming cases if they thought there was the possibility of recovering their fees and costs. If more victims could obtain representation, then more people would be able to recover their homes or other lost assets. Moreover, if the exploiter stood to lose the fruits of his crime and to be required to pay the attorney’s fees and costs incurred by the victim, perhaps he would be less inclined to exploit vulnerable Virginians in the first place. This bill passed and became law July 1, 2014, adding Virginia Code § 8.01-221.2 to provide that in any civil action to rescind a deed, contract or other instrument, the plaintiff can be awarded reasonable attorney’s fees and costs of bringing the action, if the court finds, by clear and convincing evidence, that the instrument was obtained by fraud or undue influence. By encouraging more private attorneys to take these cases, this law should enable more victims of fraud and undue influence to recover their assets.

Case Studies and the New Laws

So would these two new laws have
had any impact on the cases of Mr. Jones and Mrs. Smith? It is unlikely that either Mr. Jones or Mrs. Smith would have benefited from the new criminal Code § 18.2-178.1 because neither would be considered “mentally incapacitated”; they both understood the nature and consequences of the transaction into which they thought they were entering. It is unlikely that either Sarah or Mrs. Smith’s son would be charged with larceny under the new statute. However, both Mr. Jones and Mrs. Smith could benefit from the civil remedy in § 8.01-221.2. It is very likely that a court would find that Sarah had obtained the deed to Mr. Jones’ home through undue influence. If so, Mr. Jones should be able to recover his attorney’s fees and costs from Sarah, as well as rescission of the deed to his home. Without this provision, Mr. Jones might have had difficulty finding a private attorney willing to invest the time and cost of handling such a case without any realistic hope of being paid. Similarly, Mrs. Smith would also benefit from the new code section allowing the court to require the exploiter to pay her attorney’s fees and costs. Not only did her son manipulate her into signing the papers but he also defrauded her, telling her that the document she was signing was to enable him to handle her checks, when in fact it was a deed to her home.

While neither of these victims would likely benefit from the new criminal statute, other perpetrators who target mentally incapacitated victims could more readily be prosecuted for taking advantage of the mental incapacity of their victim to deprive them of their property.

Conclusions

So what are the takeaways from this history of legislative advocacy around the issue of financial exploitation in general and undue influence specifically? One is that legislative advocacy is often a long, difficult process with many bends in the road: compromise on language, change in approaches, gathering of additional support, neutralization of opposition, sometimes over several General Assembly sessions. It can be challenging to discern when it simply requires several years to be successful, as opposed to when it is time to try a new approach rather than continuing to ‘beat a dead horse.’ Approaching a problem from different directions at the same time can be helpful but it can also be a distraction. For example, it ultimately was helpful to attack this problem from both the criminal and civil sides, but, at times, legislators would point to the other (criminal) bills as a reason not to take action on this (civil) bill. Another lesson is that legislative advocacy is often “the art of the possible” and that advocates must recognize that the perfect can sometimes be the enemy of the good. We certainly have not achieved the perfect result in our attempts to find new ways to deter and punish exploiters or to afford more victims the ability to recover their losses. We have, however, advanced the ability of prosecutors to charge and convict those who exploit and victimize the mentally incapacitated, and we have improved victims’ access to the courts to recover their homes or other assets when those were obtained by fraud or undue influence. Two small but not insignificant steps forward for victims of financial exploitation.

Study Questions

1. How would you define financial exploitation?
2. What are some of the elements of undue influence?
3. Can you identify some of the legislative challenges in addressing the problem of undue influence?

Resources

http://law.lis.virginia.gov/vacode/title63.2/chapter16/section63.2-1606/ sets out those groups that are mandated reporters under Virginia law.


Postscript

This article was written prior to the 2016 General Assembly. During the 2016 session, there was continuing interest in financial exploitation and in some of the issues raised above. Ten financial exploitation bills of various types (including five virtually identical bills brought by five different legislators) were introduced. Of these, two bills passed out of the legislature and have been approved by the Governor. One bill (HB 248/ SB 249) requires that the local department of social services or adult protective services immediately refer any financial exploitation report to local law enforcement for investigation, if the losses are suspected to be greater than
The second successful financial exploitation bill (HB 676) directs the Department for Aging and Rehabilitative Services (DARS) to form a workgroup to study financial exploitation, determine the cost of financial exploitation of adults in the Commonwealth, and develop recommendations for improving the ability of financial institutions to identify and report financial exploitation.

About the Author

Kathy Pryor, J.D., is a staff attorney specializing in elder law with the Virginia Poverty Law Center, the statewide support center for legal aid programs throughout Virginia. She worked as a paralegal for older adults at Central Virginia Legal Aid Society for seven years before going to law school. After obtaining her law degree from the University of Virginia in 1989, she soon returned to Central Virginia Legal Aid to represent low-income elderly clients in various civil matters, staying 13 years before moving to the VPLC in 2005. At VPLC, Kathy provides technical assistance, training, and co-counseling to legal services advocates and long term care ombudsmen around the state on elder law issues, and is an advocate for systemic change around elder law and long term care issues in the legislative and administrative arenas. You may reach her at kathy@vplc.org.