

# Prosecuting Crimes Against the Elderly While Addressing the Victim's Loss of Autonomy

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## PROSECUTING CRIMES AGAINST THE ELDERLY WHILE ADDRESSING THE VICTIM'S LOSS OF AUTONOMY

Preston Mighdoll\*

At the conclusion of her deposition, the eighty-eight year-old victim of financial exploitation in Boca Raton, Florida, was asked if there was anything she wanted to add to her testimony. After reliving the year and a half during which she lost over \$60,000 to a man who arrived at her home to plant bushes in her yard, she said, "No, not particularly. It used to be a nice place to live. If my dad and someone else wanted something from the other, they said, 'Yeah, that's fine,' shook hands, and one paid the other. There was none of this, all the legal technicalities. It's hard to breathe today, if you don't ask somebody. It's a different world. I'm glad I'm as old as I am. I feel sorry for all the young people, but they don't know any better. It was a nice time to live when these things didn't happen. Now you can't trust anybody. And I think that's a shame."

Despite her poise and articulate manner, this victim preferred not to testify in court. She wanted to put this situation behind her and return to her now quiet life residing in an adult living facility. But she did not want this to happen to anyone else.

There were moments when her memory faded. Like so many other older widows, she had never handled her financial affairs and was unaware of her assets. She was from the "old school" and was impressed by the perpetrator's good manners and clean appearance. Once her niece's husband discovered the theft of her assets, they moved her to another state to be close to them. Reports were made to the police, an investigation was completed, and prosecution was initiated.

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\* Preston Mighdoll serves as Chief of the Economic Crimes and Crimes Against the Elderly Unit of the Office of the State Attorney in Palm Beach County, Florida since 1993. He is a 1973 graduate of the State University of New York at Stony Brook and a 1976 graduate of the New England School of Law, Boston. From 1976 to 1979 Mr. Mighdoll was an Assistant Public Defender in Miami and West Palm Beach and from 1979 to 1993 he was in private practice.

## LAWS PROTECTING THE ELDERLY

Fortunately, Florida and most states have adopted legislation to protect the elderly from victimization and to prosecute perpetrators with specific laws and enhanced penalties. As with other developing areas of law, we must be cautious with the swinging of the pendulum from lack of protection to insensitively pursuing cases without understanding the impact upon the victim. We must protect these senior citizens as their independence becomes restricted.

### *EXPLOITATION*

The trust officers in a Palm Beach Bank became concerned because their elderly client appeared depressed since the recent death of her husband, and because she was deteriorating physically. They requested an evaluation by a nursing service in the business of assisting older persons. Recommendations were made, which included hiring a full-time caregiver.

With the passage of time, the victim's depression lifted as the individual hired to care for her exploited her. Credit cards and checking accounts were used for the personal benefit of the caregiver, and a house and motor vehicle were purchased for the caregiver's use. Their relationship grew closer as the perpetrator convinced the victim that the bank officials wanted to place her in a nursing home and take her assets.

After the police were notified, Adult Protective Services removed the caregiver and requested an Emergency Guardianship from the court. Our victim was protected, yet her condition once again deteriorated, and she passed away shortly thereafter.

### *STATE ATTORNEY'S CRIME AGAINST THE ELDERLY UNIT*

For over a decade, the Crimes Against the Elderly Unit in the Office of the State Attorney for the Fifteenth Judicial Circuit for Palm Beach County, Florida, has collaborated with social service agencies and law enforcement to respond to the escalating victimization of the elderly. Over thirty percent of the county's population is over sixty years of age and increasing. South Florida is often viewed as a mecca for scam artists pinpointing the elderly as victims.<sup>1</sup>

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1. Florida Dep't of Elder Affairs, Florida County Profile 2001, available at <http://elderaffairs.state.fl.us/docx/english/Stats/2001cp.pdf> (last visited July 9, 2003).

## **VIOLENCE IN THE FAMILY**

The fifty-one year-old alcoholic son living with his elderly parents had a history of acting out physically against them. After each arrest the parents denied the allegations and vehemently demanded that criminal charges be dropped and their son returned home. After several such episodes, an altercation resulted in the mother being hospitalized in a coma. The son was incarcerated, but eventually charges of battery on a person over sixty-five years of age<sup>2</sup> were dropped, as there were not independent witnesses to the incident.

The victim and her husband, who had also been battered by the son, were taken out of state by their daughter to be cared for and to prevent a recurrence of these events. Upon his release from custody, the son unlawfully entered his parents' local residence and a civil proceeding was initiated for his removal.

## **FIRST RESPONDERS**

Whether we are the State Attorney's office, Adult Protective Services, law enforcement, the Legal Aid Society or the myriad of social service agencies addressing elderly issues, we are all potentially first responders to complaints received on behalf of victims. We work as a team to provide a resolution to the immediate needs of the elderly individual. However, the legislation applicable to each of the various agencies differs in the definitions of the victim we are attempting to assist.

## **STATUTORY DEFINITIONS**

Florida Statutes<sup>3</sup> define an "elderly person," as it applies to criminal abuse, neglect, and exploitation, as:

[A] person sixty (60) years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired.

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2. FLA. STAT. § 784.08.

3. § 825.101(5).

Florida Statutes<sup>4</sup> define an "incapacitated person," under Florida guardianship laws, as "a person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of such person."

Florida Statutes<sup>5</sup> define a "vulnerable adult," as it applies to the administration of Adult Protective Services. It states that a:

[V]ulnerable adult means a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, physical, or developmental disability or dysfunctioning, or brain damage, or the infirmities of aging.

Florida Statutes<sup>6</sup> which address assault or battery on persons sixty-five years of age or older do not have any other specific criteria other than the age of the victim.

#### **ABUSE HOTLINE**

Adult Protective Services from the Florida Department of Children and Families will first respond to a report to the Florida Abuse Registry.<sup>7</sup> They make a determination whether the elderly victim is a vulnerable adult as defined in Florida Statutes.<sup>8</sup> If a guardianship is appropriate, the definition of incapacitated person<sup>9</sup> will become relevant.

If a case is referred to law enforcement, the definition of elderly person becomes the primary issue. A charge of abuse, neglect, or exploitation under Florida Statutes chapter 825 must satisfy the statutory elements of the crime alleged.

#### **COMPETENCY AND LOSS OF AUTONOMY**

Prior to reaching our eighteenth birthday, each of us is considered incompetent in the eyes of the law. We are unable to contract, own property, or be held responsible for caring for ourselves. The challenge

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4. § 744.102(10).

5. § 415.103(26).

6. § 784.08.

7. 1-800-96ABUSE.

8. § 415.102(26).

9. § 744.102(10).

in legislating for the rights and protection of the elderly, vulnerable adult or incapacitated person is to define when their physical or mental deterioration has rendered them incapable of caring for themselves.

Once the systems we have created to protect the elderly take actions to prevent, stop, and punish those who victimize them, there is a resulting loss in autonomy for the elderly individual. Whether it be placement in a care facility, a move to a relative's home in another state, or the ordering of a guardianship, the now protected elderly person will not be returned to his or her prior living situation.

### **PROFILE OF THE ELDERLY VICTIM**

The profile of a typical elderly victim is a female, over seventy-five years of age, who lives with and is dependent on the abuser.<sup>10</sup> Generally, the victim suffers from short-term memory loss, which is one of the enumerated "infirmities of aging" under Florida Statutes Chapter 825. Associated with her dependence on the abuser is a sense of isolation and loneliness.

If a theft is involved, the victim tends not to be aware of its occurrence. If a family member or hired caregiver has committed a physical crime such as abuse, neglect, or a battery, embarrassment or denial by the victim is common. In either instance we usually find the elderly victim feeling responsible for what has been done to him or her, an articulation of a sense of guilt, and statements of embarrassment coupled with a determination not to prosecute the case.

With the discovery of exploitation by a concerned relative or the reporting of a physical crime against an elderly victim comes alteration in his or her living situation. It is vital for everyone who attempts to assist the victim to acknowledge the injustice that has been perpetrated against him or her while respecting the closeness the elderly person may be feeling toward those who have violated his or her trust.

### **THE VICTIM'S FUTURE**

Those of us working to assist elderly victims, to investigate abuse, neglect, and exploitation, and to prosecute the perpetrators in our criminal justice system, must remain open-minded and flexible. We must reflect upon our experiences with the cases we handle to determine methodologies to plan for the future safety of the elderly victim while understanding that they have lost their ability of self-

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10. Nat'l Ctr. on Elder Abuse, *Elder Abuse Information Series No. 3* (1996), available at <http://www.elderabusecenter.org/pdf/basics/fact3.pdf> (last visited July 9, 2003).

determination.

Education of prosecutors, defense attorneys, judges, law enforcement, and social service workers is essential. Members of law enforcement, when interviewing elderly victims, require patience and special skills. Social service workers must be available to assess the needs of elderly victims. Prosecutors must understand that the ends of justice are not necessarily best served by a conviction in every case. Defense attorneys must understand that only advocating for a "not guilty" disposition may not be in the best interest of their client. Judges must be prepared and be given the tools to devote special time, attention, and sensitivity to these cases.

### **PALM BEACH COUNTY EXPERIENCE**

In Palm Beach County, Florida, we have utilized a team approach with the creation of a task force to address abuse, neglect, and exploitation of the elderly. A collaborative effort among the various agencies that address the issues affecting the elderly has been beneficial at every stage. Referrals to community services and plans for the future safety of the victims are more easily accomplished when social workers, police investigators, and prosecutors have open lines of communication.

Compensation to the victim through court-ordered restitution or state-funded programs and residential care must be regarded as being as vital to the prosecution of crimes against elderly persons as incarceration or probationary sentences for the defendant.

### **CONCLUSION**

Whether an elderly person is a victim of a financial crime such as exploitation, or a physical crime such as abuse, neglect, or battery, it is unlikely that their living situation will remain unchanged. New legislation has given prosecutors the tools with which to seek enhanced penalties against those who victimize senior citizens. We must also continue to coordinate our efforts with social service providers to ensure that the dignity of elderly victims of crime is protected.