



Financial Exploitation of Incapacitated Adults

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Study Authorization



- Delegate Robert B. Bell requested staff to conduct a review of financial crimes against incapacitated adults.
- This study focused on a review of existing larceny crimes in Virginia, other state statutes that were specifically drafted to cover financial crimes against the elderly or incapacitated adults, and the bills that were introduced during the 2012 Regular Session of the General Assembly.

Background



- Several recent reports and studies have indicated that the rates of financial crimes against the elderly (65 and older) have increased in the past few years.
- Data collected by DCJS, using Incident-Based Reporting System data provided by the Virginia State Police, shows that:
 - Between 2001 and 2007, overall state financial crimes increased at a rate of 8.6%;
 - For victims aged 65 or older, the rate increased by 18%.

Background



- The losses suffered by elderly victims of financial exploitation can be large:
 - A 2010 study that consisted of interviews with 54 elder adults (average age of 76 years) in Virginia and their case workers, and an in-depth analysis of the crimes and abuse they suffered, revealed that the dollar amount loss for each victim averaged \$87,967.

Source: Financial Abuse of Elderly People vs. Other Forms of Elder Abuse: Assessing Their Dynamics, Risk Factors, and Society's Response (Jackson & Hafemeister, 2010).

Background



- In recent years, the Virginia General Assembly has seen an increase in the number of bills dealing with crimes against the elderly and financial exploitation.
- During the 2012 Regular Session, there were 4 Senate bills and 7 House bills introduced dealing with these types of crimes:
 - SB 222 (Herring); SB 285 (Herring); SB 431 (Stuart); and SB 443 (Vogel).
 - HB 125 (Kilgore); HB 409 (Watts); HB 690 (Plum); HB 700 (Filler-Corn), HB 882 (Sickles); HB 982 (Scott, J.M.); and HB 987 (Loupassi).

Background



- The bills vary in their approach to the issue:
 - HB 125 re-affirms the existing law that if someone with a power of attorney violates his duties and converts funds belonging to the principal, he is guilty of embezzlement.
 - HB 700, HB 982, and SB 285 take existing crimes against person or property, and make it an additional offense if the victim is an incapacitated or elder adult.
 - The other bills create a new crime of “financial exploitation,” one of the elements of which is using “undue influence,” “coercion,” and “manipulation” or “harassment,” to obtain property.

Background



- All of the Senate Bills were rolled into SB 431, which was passed by the Senate, modified in the House Courts Committee, and then left in the House Appropriations Committee.
- House Bill 125 was passed by the House Appropriations Committee, and then left in the House Appropriations Committee.
- All of the other House Bills were rolled into HB 987, which was modified in the House Courts Committee, and then left in the House Appropriations Committee.

Common Law



- Virginia criminalizes the four main types of theft that evolved under the common law:
 - Larceny;
 - Embezzlement;
 - Larceny by trick; and,
 - False pretenses.

Common Law



- Larceny is the “wrongful or fraudulent taking of personal goods of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently.” Dunlavey v. Commonwealth, 184 Va. 521, 524 (1945).

Common Law



- Embezzlement occurs when a person “wrongfully and fraudulently uses, disposes of, conceals or embezzles...personal property...which he shall have received for another or for his employer...or by virtue of his office, trust, or employment, or which shall have been entrusted or delivered to him by another.” Va. Code § 18.2-111.
 - “A person entrusted with possession of another’s personalty who converts such property to his own use or benefit is guilty of the statutory offense of embezzlement.” C.D. Smith v. Commonwealth, 222 Va. 646, 649 (1981).

Common Law



- Under the common law of embezzlement, it is not a defense that the defendant misappropriated the property for the benefit of a third party.
 - “[I]t is not necessary to show that the defendant misappropriated the property for his own personal use and benefit; it is sufficient to show that the defendant took the property to benefit another.” Wells v. Commonwealth, 60 Va. App. 111, 118-119 (2012).

Common Law



- Larceny by trick occurs when a larceny is accomplished by tricking or fooling the victim into voluntarily turning over possession of an item.
 - Larceny by trick is “when one obtains the property of another by making a false representation of a past event or an existing fact with the intent to defraud the owner of the property by causing the owner of the property to part with the property.” Owolabi v. Commonwealth, 16 Va. App. 78, 79 (1993).

Common Law



- False pretenses, or fraud, is similar to larceny by trick—the victim is tricked or fooled into voluntarily giving both possession of, and title to, an item.
 - It is the transfer of title which separates false pretenses from larceny.
 - False pretenses involves “(1) an intent to defraud; (2) an actual fraud; (3) use of false pretenses for the purpose of perpetrating the fraud; and (4) accomplishment of the fraud by means of the false pretenses...that is, the false pretenses to some degree must have induced the owner to part with his property.” Riegert v. Commonwealth, 218 Va. 511, 518 (1977).

Common Law



- For the crimes of larceny and embezzlement, the lack of consent of the victim is an element to be proven.
 - Consent is not an issue for larceny by trick or false pretenses, because consent has been obtained, though illegally.
- The common law recognized that consent was only valid if it was a voluntary or knowing consent.
 - Consent could not be obtained by reason of infancy, insanity, or intoxication; or if obtained by force, threatened force, or fraud.

Consent



- While there are no cases in Virginia that deal specifically with this issue of consent in the context of larceny, a number of other state appellate courts have held that consent cannot be obtained from someone who is mentally incapacitated.
 - Alabama, Connecticut, New York and Michigan.

Consent - Alabama



- “The state’s evidence also provides a fair inference that [the defendant] knew [the victim] was not mentally competent and took advantage of this fact in order to obtain unauthorized control of [the victim’s] funds.” Gainer v. State, 553 So.2d 673, 680 (Ala. Crim. App. 1989).

Consent - Connecticut



- “The witnesses’ testimony as to the victim’s mental incapacity, coupled with evidence that the defendant was siphoning the victim’s accounts, supports the trial court’s conclusions that: (1) the victim lacked the capacity to understand the transfers or consent to them; and (2) the defendant had been unduly influencing the victim in the transfer of her assets.” State v. Calonico, 770 A.2d 454, 469 (Conn. 2001).

Consent – New York



- “In reviewing the evidence, we conclude that the People proved beyond a reasonable doubt that the victim was incapable of consenting to defendant’s actions and that the defendant was cognizant of her diminished mental capacity, yet continued to deplete her assets.” People v. Camiola, 225 A.D.2d 380, 381 (N.Y. App. Div. 1st Dep. 1996).

Consent - Michigan



- “Testimony that [the defendant] discussed [the victim’s] mental status with medical staff...suggests that she also questioned [the victim’s] ability to make decisions for herself. Not only does that contradict [the defendant’s] argument that she relied in good faith on [the victim’s] consent...it also is relevant to the underlying question whether [the victim] had the capacity to consent.” People v. Cain, 605 N.W.2d 28, 44 (Mich. App. 1999).

Consent



- Some states have statutorily modified, or defined, the meaning of the word “consent,” when “consent” is an element of a crime.
 - For example, Colorado and Texas.

Consent - Colorado



- “Unless otherwise provided by this code or by the law defining the offense, assent does not constitute consent if...It is given by a person who, by reason of immaturity, mental disease or mental defect, or intoxication, is manifestly unable and is known or reasonably should be known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense.” COLO. REV. STAT. ANN. § 18-1-505 (West 2012).

Consent - Texas



- “Consent is not effective if: induced by deception or coercion; or given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property; or given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property dispositions.” TEX. PENAL CODE ANN. § 31.01(3) (West 2012).

Other States



- Currently, 33 states have a specific, separate statute that criminalizes financial exploitation or abuse of an elderly or incapacitated person.
 - In Oregon, South Dakota, and Tennessee, the statute only applies if the defendant has a legal duty to care for the victim.

Other States



- There are 11 states which have not enacted any statutes in this area:
 - Alaska, Arizona, Connecticut, Hawaii, Iowa, Maine, Massachusetts, New Jersey, New Hampshire, New York, Washington.

Other States



- The remaining five states have an enhanced penalty for anyone who commits an act of larceny, embezzlement, or fraud against an elderly or “at risk” adult.
 - California, Colorado, Ohio, Pennsylvania, and Wisconsin.
- The elements of the crime are the same as for any other victim; only the penalty is greater.

Other States



- Of the 33 states that have a specific statute, Utah's is the most comprehensive and strict:
 - Anyone age 65 or older is defined as a vulnerable adult;
 - It is not a defense that the defendant did not know the age of the victim;
 - It applies not just to fiduciaries and persons having a legal duty of care to the vulnerable adult, but also to anyone who has any kind of a business relationship;
 - A person violates this statute if he conceals the “preexisting condition of any property involved in a contract or agreement.”

Other States



- Mississippi’s statute makes it unlawful for any person to “exploit any vulnerable adult.”
 - A vulnerable adult includes anyone whose daily living activities are impaired due to a mental, emotional, or physical dysfunction, or the infirmities of aging.
 - Exploit is defined as the “illegal or improper use of a vulnerable person or his resources...with or without the consent of the vulnerable adult.”
- The Mississippi Supreme Court, in Decker v. State, 66 So.3d 654, 658 (2011), noted in dicta, “We are troubled by the statute’s broad reach.”

Other States



- New Mexico’s statute only applies to residents of a care facility, which can include a person’s own home if they receive nursing care there.
- It criminalizes “the act or process, performed intentionally, knowingly, or recklessly, of using a resident’s property for another person’s profit, advantage or benefit, without legal entitlement to do so.”

Other States



- Alabama’s statute is typical of many states:
 - A protected person includes any adult “that is mentally or physically incapable of adequately caring for himself or herself and his or her interests without serious consequences to himself or herself or others.”
 - It is a crime to “exploit” any protected person.
 - “Exploit” is defined as the “expenditure, diminution, or use of the property, assets, or resources of a protected person without the express voluntary consent of that person or his or her legally authorized representative.”

Anecdotes from Virginia



- Staff informally solicited requests for examples in Virginia where an elderly or incapacitated adult was the subject of financial exploitation.
- This was not a true survey, and cannot be considered anything more than a general gathering of selected anecdotal evidence.
- In some of the reported instances, what initially appeared to be a case of financial exploitation was actually a situation where family relatives were upset on how the “victim” was spending his or her money.

Anecdotes from Virginia



- In a number of other cases, criminal charges ultimately were filed, and the defendant either pled guilty or was found guilty of embezzlement, fraud, or forging or uttering checks.
- It appears that in clear cases of elder exploitation, law enforcement and prosecutors in Virginia can successfully prosecute defendants.

Anecdotes from Virginia



- An exploitation that involves a power of attorney appears to be easier to prosecute than one where there is no fiduciary duty between the parties.
- Instances where a person is not clearly incompetent, and is convinced by a “friend” or relative to give gifts or money are the most difficult, both in terms of determining whether any laws have been broken, and whether it is proper for a prosecution to proceed.

Anecdotes from Virginia



- There were some cases where exploitation was alleged to have occurred, yet it was not clear if any criminal laws had been broken.
- Many of these cases involved a victim who shortly thereafter was placed in the care of a conservator, or who probably would have met the standard for being placed in a conservatorship, i.e., was an incapacitated person.

Virginia's Definition of Incapacitated Persons



- Virginia Code § 64.2-2000 defines an incapacitated person, for purposes of conservatorship, as:
 - found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his support...without the assistance or protection of a conservator.

Virginia's Definition of Incapacitated Persons



- Virginia Code § 64.2-2000 then adds, “A finding that the individual displays poor judgment alone shall not be considered sufficient evidence that the individual is an incapacitated person within the meaning of this definition.”

Virginia's Definition of Incapacitated Person



- This definition is similar to the one found in Va. Code § 63.2-1603, which applies to Adult Protective Services:
 - “Incapacitated person” means any adult who is impaired by reason of mental illness, intellectual disability, physical illness or disability, advanced age or other causes to the extent that the adult lacks sufficient understanding or capacity to make, communicate or carry out responsible decisions concerning his or her well-being.

Policy Considerations



Option 1:

- Keep Virginia's laws as they currently are, with no changes.

Policy Considerations



Option 2:

- Keep Virginia's criminal laws as they currently are, with no changes, but statutorily define "consent," as was done in Texas and Colorado, to make clear that a person who is mentally incapacitated cannot give valid consent for the transfer of his property.

Policy Considerations



Option 3:

- Keep all existing larceny crimes as they currently are, but provide for a heightened penalty if the victim is mentally incapacitated.
 - Should the definition of a mentally incapacitated victim track the one provided in Virginia’s conservatorship statute?
 - Should the definition track the one provided in Virginia’s statute for Adult Protective Services?
 - Should there be a more expansive definition, such as the one proposed by the final version of HB 987, or HB 882, as introduced?

Policy Considerations



Option 4:

- Create a new statutory crime that is more expansive than the current crimes of larceny, embezzlement, and false pretenses.
 - Should the new crime confine its terms to those that are currently or regularly used in Virginia’s criminal law? (e.g., HB 987 as modified by the House Courts Committee).
 - Or, should it employ broader, novel definitions; e.g., “undue influence,” “coercion,” “harassment,” or “manipulation?” (e.g., SB 431 as introduced or as modified by the Senate Courts Committee).

Policy Considerations



Option 4 (continued):

- Create a new statutory crime that is more expansive than the current crimes of larceny, embezzlement, and false pretenses.
 - Should the new crime apply only to those who have a fiduciary relationship to the victim?
 - Should the new crime apply only to those who have either a fiduciary duty or a legal duty to provide care to the victim?
 - Should the new crime apply to everyone?



Discussion
