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VOL. 16 NO. 1 JANUARY 2010

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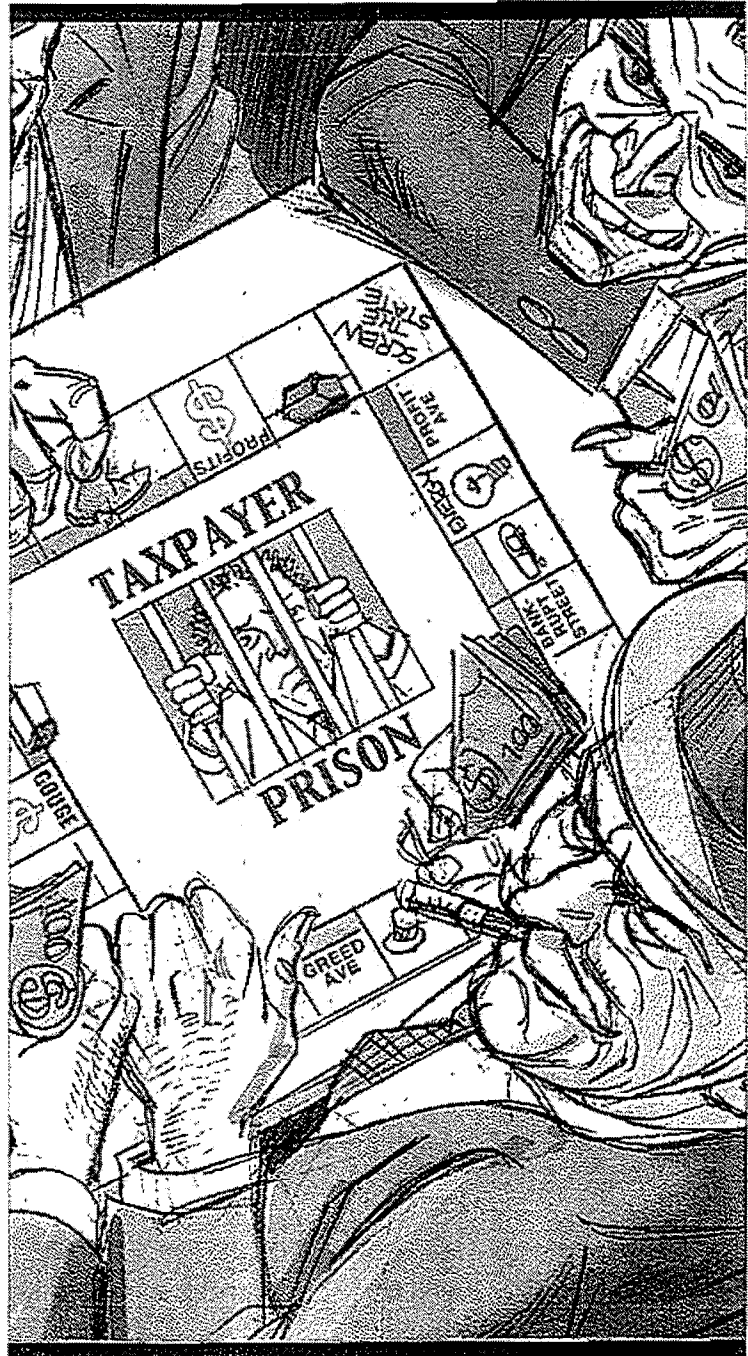
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THE CRISIS IN GUARDIANSHIP

by Sylvia E. Di Pietro, Esq.



The Baby Boomers, those born between 1946 and 1964 and whose numbers include Presidents Bill Clinton and George W. Bush, Bruce Springsteen, a/k/a The Boss, and countless members of Congress and celebrities, hit the American scene as phenomenon with a bang 40 years ago. It was the famous three-day "moment of muddy madness" rock concert

near Woodstock, New York, called in the name of peace, which brought the Boomers out in droves.

It was a hell of a party, as more than 450,000 music lovers ventured to the pasture of a Sullivan County farm to celebrate and enjoy "Three Days of Peace and Music." The music began to play at 5:07 p.m. on Friday, August 15th, 1969 and ended around mid-morning of Monday, August 18th. The festival created one of the nation's worst traffic jams, as it closed the New York State Thruway.

The Graying of America

The year 2006 marked a turning point as youths, once long-haired and shabbily clothed, began turning 60. The

year 2011 will mark another milestone as approximately 78 million baby boomers begin the march toward senior status as the graying of America swings into full bloom. While, historically, children outnumber their few long-lived sages, today's age-wave is producing a populace which is projected to live beyond its time, and this aging process is sure to impact all future generations. What's more, this aging process occurs as America's "oldest old" population, consisting of those 85 years and older, continues to grow so rapidly that it is expected to increase from 4.7 million in 2003 to 9.6 million by 2030. The U.S. Census predicts that in 2030, one in every 4 people, or 25% of the population, will be 65 years or older.

The impact of this "graying force," together with the problems that accompany the aging process, will have a profound effect on guardianship proceedings throughout the nation. Consider the latest statistics with respect to disability as a function of age. As reported in 2001, 42.3% of individuals between the ages of 64 and 74 are expected to experience some form of disability. This percentage climbs to a whopping 64% for individuals aged 74 and above. In 2002, the latest year for which data is available for persons 65 years or older, the statistics show that 12.3% of the U.S. population, or about one in every eight Americans, was 65 years or over. Imagine the staggering number of possibly disabled seniors that could exist by 2020, when the number of Americans aged 55 and over is expected to climb to 32.9% of the population; those aged 65 years and over is projected to be 13.2% of the population. This statistic takes into consideration that many Boomers stress the necessity of staying healthy and fit. By 2050, the

Sylvia E. Di Pietro, Esq., a native New Yorker, is admitted to practice before the courts of the State of New York and the United States District Courts for the Eastern and Southern Districts of New York. Ms. Di Pietro graduated from Long Island University with honors with a BA and MA in English. She is a graduate of Brooklyn Law School and a former Vice President of the New York Women's Bar Association, a member of its Trusts and Estate Section, a Delegate to the Network of Bar Leaders and the Board of Directors of the Women's Bar Association of the State of New York.

Presently, Ms. Di Pietro is a member of the Board of Directors of New York County Lawyers Association (NYCLA), a member of the Executive Communications and CLE Committees, a Delegate to the New York State Bar Association and the Chair to the Estates Trusts Section, where she formerly held the Chair of the Real Property Section (2002-2008) and Co-Chair of the Committee on Coops and Condos. She is a Mentor with the Ethics Institute and an Alternate NYCLA Delegate to the Network of Bar Leaders representing the President of the Bar. Ms. Di Pietro is a frequent speaker at NYCLA Institute's continuing legal education classes, more recently covering Detecting Forgery in Trusts and Estate and Will Contests, Ethical Issues in Trusts and Estates Practice, Probate, Will Contests, Not for Profit Boards, and Bridging the Gap.

Ms. Di Pietro is a member of the New York State Bar Association's Sections on Elder Law and Trusts and Estates, and participates as a member of the Committees on the Elderly and Disabled, Estate Litigation and Pre-Mortem Probate. She is a member of the Commercial and Federal Litigation Section and Young Lawyers Section. She is a former member of the Special Committee on Cyberspace Law. She is also a member of the Jewish Lawyers Guild, the Columbian Lawyers Association, First Department, and the New York City Bar where she is a member of the Council on Judicial Administration, Chair of the Subcommittee on Guardianship Law, the Chair of the First Department Guardianship Roundtable, and a former member of the State Courts of Superior Jurisdiction.

Ms. Di Pietro participates as a Pro Bono Employer/Mentor with CUNY's Associate Degree Program at New York City College of Technology, Legal Assistant Studies Department, where she mentors paralegal students prior to seeking employment. As Chair of the Estates Trusts Section at NYCLA, she also mentors law students who are interested in pursuing a career in probate and administration.

population aged 65 or older is expected to explode to 86.7 million.

This skyrocketing population, with its very size and longevity, will trigger modifications to Social Security, Medicare, disability and retirement benefits. It will also have a major impact on at least nine states that, in 2000, had 1 million people or more aged 65 and older: California, Florida, New York, Texas, Pennsylvania, Ohio, Illinois, Michigan and New Jersey.

Adding to this dilemma, the present high divorce rate nationally and the increasing number of "gray divorces" in the elder years, changing marital and family compositions, will modify the type of family support available to individuals in their later years. Not only are today's families separated by greater distances, but the rise in divorce, remarriage and influx of children born to different parents as a result of remarriage, make it more difficult for family members to care for their elders.

Depleting Reserves to Take Care of Elderly Parents

Never has old age lasted so long or been so costly. Today about 20% of baby boomers — 14 million — take care of an aging loved one, according to a National Marketing Institute report done for the AARP. The costs of long-term care can include emergency expenses associated with travel to an out-of-state parent, incontinence supplies and the installation of grab bars for the shower that are not covered by Medicaid. Moreover, few states cover home care for the elderly as does New York State which, unlike many states, provides both the mandatory and some optional home health benefits to those eligible for Medicaid.

Baby Boomers who are able to care for their ailing elders find that their own retirement prospects are



Mike Keefe/Denver Post

compromised by being required to take unpaid leave from work to care for an ailing parent or by depleting their savings as a result of unnoticed out-of-pocket costs not covered by Medicaid or Medicare, such as clothing, home repair and a cellular telephone. As their parents' savings dry up, many Boomers are shocked to see their inheritances evaporate as well.

Many Boomers are uncertain about the quality of their care in later years, as the economic reckoning of 2008 has created vast financial losses with the stock market plunge costing them their retirement savings and/or a drastic decline in home values. As the tax bill increased, Americans pondered whether they could afford their homes, causing them to rethink retirement needs by downsizing their plans and expectations, while perhaps extending their work years into their elder years. While statistically, the Boomer generation is considered the most prosperous in the history of the United States, still one-quarter have no savings or investments. Moreover, the greater percentage of the Boomers has taken few steps to insure a peaceful and enjoyable retirement. With rising costs of education, the evaporation of



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many retirement and investment accounts as a result of the 2008-09 financial and housing crises, and the high rate of job terminations, many Boomers feel squeezed into making decisions. As the boomers experience the stock market plunge that accompanies real estate tax increases, coupled with mom or dad possibly turning 90, many question their ability to afford full-time retirement.

A primary concern involves health care coverage: what percentage of their retirement income will be swallowed by health care costs. Medicare reimbursements frequently decline as revenues trickle in from part-time jobs seniors take to pay out-of-pocket services that continue to increase. For many, part-time employment during the retirement years appears to be part of a not-so-rosy picture.

There is also a kind of crisis within the field of geriatrics. Health care costs do not take into consideration that medical schools and residencies require little-to-no geriatric training. Many medical students are reluctant to get into this field because it is among the lowest paid of the medical professions. According to the American Geriatrics Society, in 2005, there was one geriatrician for every 5,000 people over 65. By 2030, this ratio is projected to increase to one for every 8,000 patients.

As the Boomers remain generally unprepared to face their own retirement futures, America's elderly are even less prepared to do so, especially financially. While the very poor can look to Medicaid to care for their medical and nursing home needs, few of the vast number of America's elderly have made plans for a caregiver to assume their personal and property management needs upon a disabling event.

For those who fail to make the requisite alternative plans for their personal, financial and property needs, such as appointing an agent under a durable power of attorney, executing a will and health care proxy, a guardianship proceeding may be the only remedy. While a guardian can be appointed for a temporary period of time, frequently the term is indefinite.

Shrinking Health Care as Elderly Population Grows

The signs that trouble looms ahead for senior health care are unmistakable. Rising costs of pharmaceuticals, increased use of medical therapies, higher prices of goods and services, along with the culture of America

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itself with its unsustainable demand for goods and services, emphasizing the new and the fancy, all contribute to increased medical costs.

As the number of senior citizens climbs, the resources allocated by the federal government to Medicaid and Medicare are shrinking. America's health care costs have been rising so fast that they are out of control. *Time* magazine reported in 2002 that for the prior year on a national scale, insurance premiums rose 11%, and warned that it could jump to 15% in 2002. For the year 2002 these costs didn't just rise — they skyrocketed. According to a September 2007 Kaiser Family Foundation report, the cost of health care insurance in the U.S. rose 6.1%, outpacing both the 3.7% average increase in workers' wages and the 2.6% inflation rate. Not only did the average family feel the financial pinch, but so did the employers who by 2007 faced a \$12,106 bill for a family premium — amounting to a whopping 78% increase since 2001.

Disability as a Function of Age

The *Associated Press* in 1987 gave us the first glimpse of guardianship statistics on a nationwide level in "Guardianship of the Elderly: An Ailing System." The AP reported that there were approximately 300,000 to 400,000 adults under guardianship in the country, 67% of whom were female, the average age being 79. Of this number, 33% had been moved during the guardianship proceeding and 64% were in nursing homes. The AP also noted that in 44% of the cases, the alleged incapacitated person or ward was not even represented by an attorney. In a staggering 49% of the cases, the alleged incapacitated person did not even attend the hearing.

Consider troubling statistics compiled by some researchers:

In a San Francisco probate court study of adult guardianship cases filed in the year 2000, referred to in California as conservatorships, 87% were over the age of 65, 70% had cognitive impairments that required assistance, 62% required assistance with activities of daily living, 36% resided in nursing homes, 31% resided in private homes, and almost 90% required a conservatorship of the person and of the estate.

In 2005, the *Los Angeles Times* reviewed more than 2,400 adult guardianship cases for the period between 1997 and 2003. It reported that 56% of the conservatorships were granted without notice to the individual or the family, 64% were granted before an attorney was appointed for the proposed ward, and 92% were granted before the court investigator's report.

In 1995, the Georgia State Bar, Young Lawyers Division Elder Law Committee, conducted a survey based on 500 randomly selected closed guardianship files for the year 1994. This same committee also conducted a survey for 2001-02 of 500 randomly selected closed files for 2000, which was the first time extensive data was collected in the state on adult guardianship cases. Among the results: 80% of the petitioners were family members in both years; of the proposed wards in 1994, 75% were 60 years and older, and in 2000, 70% were 60 years and older. Incapacity was a major claim for the guardianship.

In Ohio, the Adult Guardianship Services in Cleveland conducted a study on the projected need for guardianship services. Among the study's findings was a projected increase in the number of agency wards from an average of 287 per day in the year 2003 to approximately 830 in 2008.

What Are Guardianships, How Much Do They Cost and Who Pays for Them?

When an individual, young or old, is no longer able to handle his or her personal and property affairs, such as activities of daily living and personal and financial decisions, a Court can appoint a person to make those decisions for that individual. The person who handles the affairs for another, and is sometimes bonded, is called a guardian or in some jurisdictions, a conservator. The person being cared for is often called the ward, but in some jurisdictions is called the respondent or the alleged incapacitated person.

The guardianship is established by means of a court order authorizing the guardian to act on behalf of the ward. The result is a fiduciary relationship requiring the guardian to act in the best interests of the ward. The guardianship proceeding is typically filed and held in the state where the ward lives. Interested parties to the action, such as

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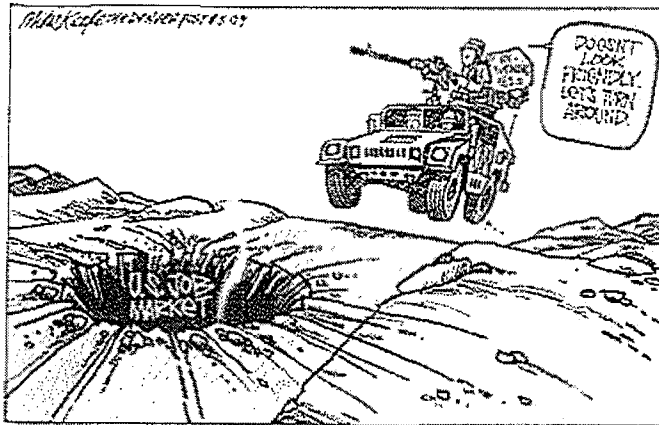
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parents or children or relatives of the ward, are given notice of the proceeding. Wherever possible or practical, the Court will usually consider the ward's choice of guardian, provided that individual is not shown to have harmed the ward. The court may also appoint a disinterested party as guardian, particularly in contested cases where there is acrimony among the parties, such as the recent and highly publicized guardianship proceeding in New York City, involving the late wealthy philanthropist Brooke Astor.

With the growing elder population in America, guardianship proceedings are on the rise, especially those that are contested. Legal fees run the gamut. Under most state systems, if the ward has assets, the ward is required to pay the costs of such a proceeding from his or her personal funds. When the ward is indigent and there are no funds to pay the legal costs of the proceeding, the state frequently pays for the costs out of some sort of indigent fund. Contested guardianships can create a nightmare for a ward who is able to pay such costs out of pocket. In the Astor guardianship proceedings, attorney and related media fees were requested in the staggering amount of \$3,044,055.71, which were reduced to \$2,223,284, with media costs denied.

Aging Diseases: A Source of Great Confusion

While guardianship proceedings can be employed to assist anyone with a disability, young or old, more frequently they are associated with the elderly adult population which suffers from physical and mental disabilities. As the population ages, older people suffer from more complex situations such as heart disease and infectious diseases like AIDS, tuberculosis, vascular dementia, Alzheimer's disease, stroke, obesity, depression, anxiety, social isolation, self neglect and problems associated with mobility and hearing.

Guardianship proceedings also apply to a younger population of adults who struggle with mental retardation, developmental disabilities, including cerebral palsy, autism, epilepsy, mental illness and those with functional disabilities. With the increasing incidents of those

suffering from autism, it is expected that by 2030, there will be several million more who may be the subject of a guardianship proceeding.

Consider the statistics for Alzheimer's disease alone as noted in the new report put out by the Alzheimer's Association, "2009 Alzheimer's Disease Facts and Figures." Alzheimer's disease accounts for approximately 79% of all forms of dementia in Americans over the age of 71. Alzheimer's is a fatal disease and considered the fifth leading cause of death for those over the age of 65. Presently there are over 5.3 million people in the United States living with Alzheimer's. Every 79 seconds someone develops Alzheimer's. The direct and indirect costs of Alzheimer's and other dementias to Medicare, Medicaid and businesses amount to more than \$148 billion each year.

Few Statistics and a Lack of Uniform Terms in Guardianships

Throughout the nation, state laws differ markedly in their definitions of the guardianship process and there are no uniform statistics applicable to monitoring, research or reform. The absence of statistical data makes it difficult, if not impossible, to predict the effect of the aging process on the state court guardianship programs. While some states are making inroads with the compilation of statistical

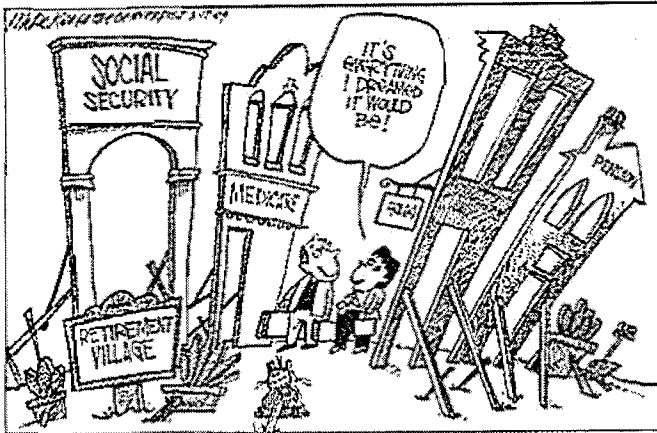
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data, the lack of uniformity among the states leaves the legal and judicial systems to work in the dark.

Without statistical data as to the number or size of the nation's incapacitated population, it is difficult to determine the most appropriate programs needed to serve the elderly and prevent elder exploitation, abuse and neglect.

Guardianship terminology also differs among the states. Some states define a guardian as an adult guardianship of the person and of the property; other states merely define a guardian as adult guardianship of the person, and other states as adult conservatorship or guardianship of the property. Many times a person will require both a guardian of the person and the property to handle their personal and property affairs. Terms and definitions of the subject of a guardianship also differ. The National Center for State Courts' *State Court Guide to Statistical Reporting 2003* notes that significant changes are being made in various categories to include separate categories within the guardianship umbrella, such as, guardianship-adult, guardianship-juvenile, conservatorship/trusteeship and elder abuse.

To broaden the confusion, some guardianship proceedings are based on functional limitations, while others require a finding of mental incapacity. In some states, the proceeding is conducted in probate court, and in others, under the general jurisdiction of the state's highest court.

Attempts to Bring Uniformity to Adult Guardianships

With a population that is both mobile and aging, there is a need for uniformity and legislation to adopt a standard guardianship law to prevent many of the pitfalls that wards are facing. Few states recognize each other's guardianships, such as North Dakota and Minnesota. These states are taking active steps to pass a bill that would provide procedures to resolve jurisdictional disputes between and among states, help to transfer guardianship cases between states, and provide for recognition and enforcement of guardianship or protective orders.

If passed by Congress, the Uniform Adult Guardianship and Protective Proceeds Jurisdiction Act may well be a small step towards uniformity. While narrow in scope, it focuses on the problems associated with conflicting jurisdictions that affect a mobile aging population, the transfer of a guardianship from one state to another, the sale of the ward's property and/or the arrangement for residential placement. Issues as to which state has jurisdiction to appoint a guardian or conservator can arise between an American state as well as with another country because an individual has contacts with more than one jurisdiction. In nearly all American states, a guardian can be appointed by a court in a state in which an individual is domiciled or is physically present, but contested cases are becoming more common because the ward may be physically located in a state other than his or her domicile. Sometimes there is uncertainty as to the adult's domicile, especially when the adult owns a vacation home in another state.

Even if all parties agree to transfer a guardianship or conservatorship, few states have streamlined procedures for acceptance of such proceeding. Frequently, all of the procedures employed with the original guardianship must be repeated in order to transfer the guardianship. This duplication is both time consuming and expensive to the ward or family members. Moreover, it appears that guardianship and protective proceedings are exceptions to the Full Faith and Credit Clause of the U.S.

Wayne Greenwald, P.C.

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Constitution, so that the court orders of one state need not be honored in another state.

The Hidden Crime, Elder Abuse, Is on the Rise

Elder financial abuse has been called the crime of the 21st century. Financial abuse costs elders more than \$2.6 billion annually, with family members and caregivers responsible in 55% of the reported cases, although financial losses were higher with investment fraud scams.

On the national scale, however, there is still a lack of adequate data with respect to elder abuse cases and it is estimated that four out of every five cases remain unreported. Some causes may be related to differing definitions, poor detection and under-reporting.

In many instances, if state courts maintain any statistics, they are not sharing them or making them available for practitioners or policy makers. While one survey on state adult protective services agencies reveals a 19.7% increase in reports of elder abuse, vulnerable adult abuse and neglect cases, many reported cases do not result in court actions.

Recent studies suggest that between one and two million Americans age 65 and older have been abused or exploited by someone they depended on for care. Elder abuse has been called the hidden crime because of its lack of detection or recognition. A recent national study of elder abuse victims suggests that in 15 states, 65.7% were women; in 20 states, 42.8% were aged 80 and older; in 13 states the majority of victims were Caucasians; 89.3% or the vast majority of elder abuse reports in 13 states took place in domestic settings. The same report cites that in 11 states 52.7% of the alleged perpetrators of abuse were female; over three-fourths or 75.1% of the perpetrators were under the age of 60; in 11 states the most common relationship of perpetrator to victim was adult child and other family member; and in 21 states, 40.4% maintained an abuse registry or database of alleged perpetrators, while 31 states or 59.6% did not. Men are also reported to be particularly vulnerable to the "sweetheart scam." While it appears that elders who live with family members are



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vulnerable, still those who have no children or grandchildren are even more at risk or susceptible to abuse.

Frequent types of elder abuse take the form of financial exploitation, domestic violence, neglect or maltreatment. Many elder victims suffer from some form of mental impairment, such as Alzheimer's, which makes these cases difficult to prosecute, especially those involving financial exploitation. As an elderly person becomes increasingly dependent on a family member or a trusted friend for assistance, the problems associated with financial exploitation become more pronounced. The elderly person is more likely to entrust financial, banking and check transactions to others. Victims sign blank checks, allow bank withdrawals and/or ATM cash transactions. Others allow these transactions, only to later discover that they were used for unauthorized purposes.

The Elder Justice Act, a bill before Congress since 2002 and reintroduced in April of 2009, would increase the awareness of elder abuse, neglect and exploitation at the national level and would train individuals from various differing disciplines to combat elder abuse and prosecute cases. The Act would provide \$400 million in federal funding for state adult protective service programs to orchestrate the coordination of federal, state, local and private activities related to elder abuse and provide staff for long-term care facilities.

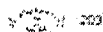
RICHARD DORN

ATTORNEY AT LAW

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