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## Civil protection orders play role in prevention of elder abuse

*This article is a summary of materials written for the May 21, 2010 Oregon Law Institute MCLE on "Representing Vulnerable Adult Abuse Victims." Those materials were originally written by Shaun Wardinsky. They were substantially updated in 2008 by Stephen Owen, and updated in 2010 by Maya Crawford.*

There are times when a victim of abuse needs urgent legal protection to address physical, emotional, and/or financial abuse. The Oregon Legislature has enacted statutes to provide civil protection from abuse. These include the Family Abuse Protection Act, civil anti-stalking protections, and the Elderly Persons and Persons with Disabilities Abuse Protection Act. Depending on the circumstances of abuse, each of these statutes could be used to protect an elderly client. Practitioners who advise clients on which type of protective order to petition for should consider the duration of the order, the ease of obtaining and defending the order, and the type of relief each order provides. For a side-by-side comparison of the orders and when each might be appropriate, refer to the chart on page 4.

### Family Abuse Prevention Act

The Family Abuse Protection Act (FAPA) was enacted to protect adults<sup>1</sup> who have been abused within the past 180 days by a family member, spouse, or intimate partner, and who are in imminent danger of further abuse. Abuse is defined as attempting to cause or causing bodily injury, placing another in fear of imminent bodily injury, or coercing involuntary sexual relations. The FAPA statute can be found at ORS 107.700 *et seq.*

Depending upon the circumstances in a particular case, a FAPA restraining order *may* provide the following relief: restrict respondent from having contact with the petitioner; restrain respondent from abusing, intimidating, molesting, interfering with, or menacing the petitioner or children in the custody of the petitioner (or attempting to do any of these things); award temporary custody of the children of the parties and order reasonable parenting time provisions; require that respondent move from the petitioner's residence; restrict respondent from entering any premises in order to protect the petitioner and children in the custody of the petitioner; and provide other relief necessary to provide for the safety and welfare of the petitioner and children in the custody of the petitioner (for example, emergency monetary relief).

FAPA restraining orders are good for one year and are renewable. They are entered into the Law Enforcement Data System, and respondents who violate a restraining order are subject to mandatory arrest. FAPA allows for a law enforcement standby for petitioner or respondent to collect necessary personal belongings from

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## Civil protection orders *Continued from page 1*

the residence as well as to secure the physical custody of the parties' minor children. Possession of a firearm is a federal crime if the requisite elements of 18 U.S.C. 922(g) are satisfied.

### Stalking Protective Orders

Oregon's stalking statute was passed to address situations where a petitioner feels threatened by repeated and unwanted contact from the respondent.<sup>2</sup> ORS 30.866 *et seq.* Due to the nature of the conduct involved, several constitutional challenges have been made to the statute in the past. For an overview of such arguments, see *Hanzo v. deParrie*, 152 Or App 525, 953 P2d 1130 (1998), *rev den*, 328 Or 418 (1999).

Unlike FAPA, there is no qualifying relationship requirement to petition for an SPO, and there is no limitation on its availability for protection of minors (although ORCP 27 may require the appointment of a guardian ad litem). An SPO may be obtained against a minor. A petitioner must reasonably fear for his or her physical safety or safety of a family or household member, and two stalking contacts must have occurred within the past two years. The contacts must be intentionally, knowingly, or recklessly engaged in, as well as being unwanted. The contacts must reasonably alarm or coerce the Petitioner or a member of Petitioner's family or household.

SPOs *may* provide the following types of relief: restrain respondent from contacting or attempting to contact the petitioner (the full and detailed definition of "contact" is in ORS 163.730); restrain the respondent from entering or attempting to enter any premises in order to protect the petitioner and petitioner's family; and civil damages. SPOs are the only restraining orders that do not require renewal once a permanent order is issued. However, a respondent may bring a motion to dismiss an SPO. *Edwards v. Biehler*, 203 Or App 271 (2005). SPOs are entered into the Law Enforcement Data system and respondents who violate an SPO are subject to mandatory arrest. A court may order mental health evaluation or treatment and may begin the commitment process. An SPO cannot, however, award custody or parenting time.

### Elderly People and People with Disabilities Abuse Prevention Act

The Elderly People and People with Disabilities Abuse Prevention Act (EPPDAPA) statute was drafted to address the specific needs and vulnerabilities of elderly persons and persons with disabilities in Oregon. ORS 124.000 *et seq.* EPPDAPA has some key distinctions from FAPA. The differences include the type of alleged abuse that is actionable, potential remedies, and the role of guardians or guardian ad litem.

Two classes of people are covered by EPPDAPA: elderly people and people with disabilities. Both are defined in the statute at ORS 124.005. Unlike FAPA there is no qualifying relationship requirement to petition for an EPPDAPA. Furthermore, either the abuse victim *OR* a court-appointed guardian (under Chapter 125) or guardian ad litem can petition for the restraining order. When a guardian petitioner applies for an EPPDAPA, the elderly person or person with disabilities retains the right to contact and retain counsel, request a hearing, and present evidence and cross examine witnesses at a hearing. The guardian petitioner must personally serve the elderly person or person with a disability within 72 hours of the court issuance of an EPPDAPA restraining order. This allows protection to be requested and put into place without the victim appearing personally before the court. The notice/service provisions allow a guardian to apply for an restraining order in instances when the alleged victim may not want the protection of the court (and allow the alleged victim to disagree). In the absence of an objection by the proposed protected person, it is possible that he or she may never directly address the court except through a guardian.

The petitioner must show that the elderly/disabled person was a victim of abuse within the past 180 days, and that he or she is in immediate danger of further abuse. Abuse is fully defined in the statute at ORS 124.005(1), but includes physical injury, inappropriate sexual contact, neglect, abandonment, derogatory speech, sweepstakes promotion abuse, and the wrongful taking or appropriating of money or property.

Depending upon the circumstances in a particular case, an EPPDAPA restraining order *may* provide the following relief: restrict respondent from having contact with the petitioner; restrain respondent from abusing, intimidating, molesting, interfering with, or menacing the petitioner (or attempting to do any of these things); require that respondent move from the petitioner's residence; restrict respondent from entering any premises in order to protect the petitioner; provide other relief necessary to provide for the safety and welfare of the petitioner; and provide relief to victims of sweepstakes fraud.

Given a finding of financial abuse, other discretionary relief is available. An EPPDAPA restraining order can direct respondent to refrain from exercising control over money or property, require respondent to return custody or control of money or property, and require the respondent to follow the instructions of the guardian or conservator. There are limitations upon the financial relief available from the court, as the court may *not* use EPPDAPA to allow any person other than the elderly person or person with disabilities to assume the responsibility to manage money or property. This type of relief is more appropriately obtained in Chapter 125 protective proceedings

*Continued on page 3*

## Civil protection orders *Continued from page 2*

EPPDAPA restraining orders are good for one year and are renewable. Additional abuse is not necessary for renewal). They are entered into the Law Enforcement Data System, and respondents who violate a restraining order are subject to mandatory arrest. EPPDAPA allows for a law enforcement standby for petitioner or respondent to collect necessary personal belongings from the residence. Possession of a firearm is a federal crime if the requisite elements of 18 U.S.C. 922(g) are satisfied.

### Obtaining a protective order in Oregon

The process for obtaining a restraining order in Oregon is relatively similar for each type of order. The process is designed for self-represented petitioners. A petitioner who seeks protection can go to the courthouse in the county where either the petitioner or the respondent lives and obtain standard forms.<sup>3</sup> Many courts have advocates to provide assistance to petitioners who seek a restraining order.

Once the petition has been completed, the petitioner will appear *ex parte* (that day or the next judicial day) and a judge will review the completed petition and ask questions when necessary. If the petition contains information that satisfies the elements required by the specific statute, the judge will issue the restraining order. If the order is granted, it must be personally served on the respondent (and the elderly person or disabled person if a guardian is petitioning for an EPPDAPA). All three statutory schemes provide for free service and do not require a filing fee or fees for certified copies of the orders.

Once served, the protective order is enforceable. Unless a hearing is requested by the respondent, additional court appearances are not required in FAPA and EPPDAPA restraining order proceedings. If a hearing is requested by respondent, a hearing will be set by the court and the parties will be notified.

The process for obtaining an SPO is slightly different. The SPO is also issued at the *ex parte* appearance, but it is a temporary order and a hearing *must* be scheduled to determine whether a permanent order should be issued. If a Petitioner successfully defends their Stalking RO, then a permanent RO is issued.

In all restraining order hearings, the respondent will have an opportunity to address the court and dispute the allegations of the petition or specific relief requested. The petitioner

has the burden of proof and the standard of proof is by a preponderance of the evidence. Both parties will have the opportunity to present witnesses and other evidence. In FAPA and EPPDAPA actions attorney fees may be awarded against either party. In SPO actions attorney fees may only be awarded to the petitioner. ■

### Footnotes

1. A minor may petition the court for relief if he or she is the spouse of the respondent; former spouse of the respondent; or a person who has been in a sexually intimate relationship with the respondent; AND the respondent is 18 years of age or older. ORS 107.726.
2. For purposes of this article, the stalking statute discussed is the stalking restraining order obtained by filing a civil complaint. Stalking orders can also be obtained through law enforcement officials pursuant to ORS 163.735 which allows issuance of a stalking restraining order through citation.
3. FAPA and EPPDAPA forms must be available at the courthouse. This is not the case with stalking forms, although stalking forms are now available on the OJD website. Some courthouses may have copies available.

## Resources

**Statutes:** Family Abuse Prevention Act, OR. REV. STAT. §§107.700-.735 (2009); Oregon's civil stalking Statute, OR. REV. STAT. §30.866 (2009); Elderly Persons and Persons with Disabilities Prevention Act, OR. REV. STAT. §§124.000-.040 (2009)(restraining order provisions).

**Oregon Law Institute:** *Representing Vulnerable Adult Abuse Victims*, Continuing Legal Ed. (May 21, 2010).

**Pro Bono Fair:** *An Integrated Approach to Representing Domestic Violence Survivors*, Continuing Legal Ed. (Oct. 27, 2009), available file://localhost/at <http://www.oregonadvocates.org>.

*A Benchguide for Elderly Persons and Persons with Disabilities Prevention Act* (Mar. 2008), [www.oregon.gov/OJD/docs/OSCA/cpsd/courtimprovement/familylaw/ElderAbuseBenchguideMarch2008.pdf](http://www.oregon.gov/OJD/docs/OSCA/cpsd/courtimprovement/familylaw/ElderAbuseBenchguideMarch2008.pdf)

*A Benchguide for Family Abuse Prevention Act* (2006), [http://courts.oregon.gov/OJD/docs/OSCA/cpsd/courtimprovement/familylaw/FAPA\\_Benchguide\\_4-24-06.pdf](http://courts.oregon.gov/OJD/docs/OSCA/cpsd/courtimprovement/familylaw/FAPA_Benchguide_4-24-06.pdf)

**Forms:** 2010 Revised FAPA and EPPDAPA Forms: [www.oregon.gov/OJD/OSCA/cpsd/courtimprovement/familylaw/index.page](http://www.oregon.gov/OJD/OSCA/cpsd/courtimprovement/familylaw/index.page)

NATIONAL CLEARINGHOUSE ON ABUSE IN LATER LIFE, [www.ncall.us](http://www.ncall.us)  
ABA COMMISSION ON DOMESTIC VIOLENCE, <http://new.abanet.org/domesticviolence/Pages/default.aspx>

## Comparison Chart

### FAPA Restraining Order Stalking Protective Order Elderly Persons and Persons with Disabilities Abuse Prevention Act Protective Order

	<b>FAPA Restraining Order</b>	<b>Stalking Protective Order</b>	<b>EPPDAPA Protective Order</b>
<b>Eligibility</b>	<p>Qualifying relationship required (household or family member)</p> <p>Limited availability to minor Petitioners (ORCP 27 may require appointment of guardian ad litem)</p> <p>Not available against minor Respondent</p>	<p>No qualifying relationship required</p> <p>No limitation on availability of protection for minors (ORCP 27 may require appointment of guardian ad litem)</p> <p>Available against minor Respondent without a guardian ad litem (constitutional concerns may warrant appointment of guardian ad litem for a very young minor)</p>	<p>No qualifying relationship required, but protected person must be elderly or disabled</p> <p>No limitation on availability of protection for a minor person with a disability</p> <p>ORCP 27 may require appointment of guardian ad litem for minor Respondent</p>
<b>Abuse</b>	<p>One incident of abuse required</p> <p>Abuse must have taken place within the last 180 days (unless Respondent is in jail or more than 100 miles away)</p> <p>Attempting to cause or intentionally, knowingly, or recklessly causing bodily injury; or intentionally, knowingly, or recklessly placing in fear of imminent bodily injury; or causing another to engage in sexual relations by force or threat of force</p> <p>Petitioner in imminent danger of further abuse</p> <p>Preponderance-of-the-evidence standard</p>	<p>Two stalking contacts required</p> <p>Stalking must have taken place within the last two years</p> <p>Intentionally, knowingly, or recklessly engaging in two or more unwanted contacts that reasonably alarm or coerce Petitioner or member of Petitioner's family or household</p> <p>Petitioner reasonably fears for his/her physical safety or safety of family or household member</p> <p>Citation and temporary protective order: probable cause standard; Permanent protective order: preponderance-of-the-evidence standard</p>	<p>One incident of abuse required</p> <p>Abuse must have taken place within the last 180 days (unless Respondent in jail or more than 100 miles away)</p> <p>Physical pain or injury caused by other than accidental means; or neglect that leads to physical harm; or abandonment or desertion or neglect by a caregiver or other person owing care duties; or willful infliction of physical pain; or inappropriate sexual comments or conduct or language of such nature as to threaten significant physical or emotional harm to the elderly or disabled person; or mailing sweepstakes promotions in certain circumstances; or wrongful taking or threat to take money or property; or unconsented-to sexual contact</p> <p>Immediate and present danger of further abuse</p> <p>Preponderance-of-the-evidence standard</p>

## Comparison Chart *Continued from page 4*

	<b>FAPA Restraining Order</b>	<b>Stalking Protective Order</b>	<b>EPPDAPA Protective Order</b>
<b>Relief</b>	<p>One year (renewable)</p> <p>Award of temporary custody/parenting time</p> <p>Can order Respondent to vacate residence in some circumstances (20-minute standby for party moving out)</p> <p>No specific provision for mental health evaluation, treatment, or commitment of Respondent</p> <p>Emergency monetary relief specifically available under <i>other relief</i> if necessary for safety of Petitioner and/or children</p> <p>No specific provision for state gun prohibition, though court may order it under <i>other relief</i> if necessary for safety of Petitioner and/or children</p> <p>No provision for arrest warrant if Respondent fails to appear</p> <p>Attorney fees available</p>	<p>Unlimited duration if permanent order; may be terminated in some circumstances</p> <p>No award of custody/parenting time</p> <p>Cannot order Respondent to vacate residence</p> <p>Court may order mental health evaluation and treatment, or may begin commitment process</p> <p>No emergency monetary relief, but civil damages available</p> <p>No specific provision for state gun prohibition</p> <p>Judge <i>may</i> issue warrant if Respondent fails to appear in civil petition case, <i>must</i> issue warrant if Respondent fails to appear in police citation case</p> <p>Attorney fees may be recovered by Petitioner, within court's discretion (civil petition route)</p>	<p>One year (renewable)</p> <p>No award of custody/parenting time</p> <p>Can order Respondent to vacate residence in some circumstances (20-minute standby for party moving out)</p> <p>No specific provision for mental health evaluation, treatment, or commitment of Respondent</p> <p>No emergency monetary relief specifically, but may be available under <i>other relief</i> if necessary for safety of Petitioner</p> <p>No specific provision for gun prohibition though court may order it under <i>other relief</i> if necessary for safety of Petitioner</p> <p>No provision for warrant if Respondent fails to appear</p> <p>Attorney fees available</p>
<b>Procedure</b>	<p>State Court Administrator mandated to develop forms and make available an instructional brochure regarding FAPA rights</p> <p>One procedure</p> <p>No filing, service, or hearing fees</p> <p>Hearing only if requested by Respondent</p> <p>No authority for parent or guardian to request relief on behalf of minor or dependent person; minor who is eligible for FAPA relief may need guardian ad litem (see ORCP 27)</p>	<p>Complaint and citation are statutorily mandated, but no mandated forms for civil petition process or for orders</p> <p>Two procedures: civil petition route and police citation route</p> <p>No filing, hearing, or service fees unless asking for civil damages</p> <p>Hearing required</p> <p>Parent or guardian may request order on behalf of minor or dependent person</p>	<p>Statutorily mandated forms for petition and initial order, and instruction booklet</p> <p>One procedure</p> <p>No filing, service, or hearing fees</p> <p>Hearing if requested by Respondent or protected person</p> <p>A guardian or a guardian ad litem may request order on behalf of elderly person or person with disabilities</p>

**Comparison Chart** *Continued from page 5*

	<b>FAPA Restraining Order</b>	<b>Stalking Protective Order</b>	<b>EPPDAPA Protective Order</b>
<b>Enforcement</b>	<p>Petitioner cannot violate</p> <p>Mandatory arrest laws apply</p> <p>Sheriffs to enter into LEDS and NCIC databases</p> <p>Good throughout Oregon</p> <p>Out-of-state orders must be enforced in Oregon</p> <p>Violation is a civil matter but remedial sanctions may be sought pursuant to ORS 33.055</p>	<p>Petitioner cannot violate</p> <p>Mandatory arrest laws apply</p> <p>Sheriffs to enter into LEDS and NCIC databases</p> <p>Good throughout Oregon</p> <p>Out-of-state orders must be enforced in Oregon</p> <p>Violation is Class A misdemeanor; 2nd violation or violation after conviction of crime of stalking is Class C felony</p>	<p>Petitioner cannot violate</p> <p>Mandatory arrest laws apply</p> <p>Sheriffs to enter into LEDS database</p> <p>Good throughout Oregon</p> <p>Out-of-state orders must be enforced in Oregon</p> <p>Violation is a civil matter but remedial sanctions may be sought pursuant to ORS 33.055</p>
<b>Federal Gun Liability</b>	<p>Federal law prohibits Respondent from using, possessing, or purchasing a firearm or ammunition if these conditions are met: protected person is "intimate partner" (or partner's child) as defined by federal law (current/past spouse or cohabitant, or parent of joint child); order is issued after hearing of which Respondent had notice and opportunity to participate; Respondent is restrained from harassing, stalking, threatening, or engaging in other conduct that places victim in reasonable fear of bodily injury to self or child; and order includes finding of credible threat to physical safety or explicitly prohibits use of force. Official use is exempt, and ban lasts only while order is in effect. See Supp §4.75.</p> <p>If Petitioner and Respondent are "intimate partners," a restraining order upheld after a noticed hearing subjects Respondent to federal liability for using, possessing, or purchasing a firearm or ammunition (terms of restraint and "credible threat" finding are automatically included in restraining orders per requirements of statute and forms)</p>	<p>If Petitioner and Respondent are "intimate partners," and if stalking order includes a finding of "credible threat" (or expressly prohibits the use of physical force), and includes the required terms of restraint, then permanent stalking order subjects Respondent to federal liability for using, possessing, or purchasing a firearm or ammunition (all permanent, and some temporary, stalking orders are issued after a noticed hearing)</p>	<p>Most EPPDAPA orders will not qualify for federal gun dispossession and criminal liability, even if Petitioner and Respondent are "intimate partners" and even if there has been a noticed hearing (most EPPDAPA orders do not include a "credible threat" finding or expressly prohibit the use of physical force by their terms, but Petitioner's attorney presumably could request inclusion of such language in appropriate cases)</p>

*This chart was created and updated by Legal Aid Services of Oregon and the Oregon Law Center for the October 27, 2009 CLE, "An Integrated Approach to Representing Domestic Violence Survivors: The Nuts and Bolts of Restraining Orders and Other Criminal and Civil Remedies."*



## Clackamas County judge strikes down portion of abuse statute

By Mark K. Kramer, Attorney at Law



Mark K. Kramer, an attorney since 1981, is a principal in the Portland law firm of Kramer and Associates, where his practice concentrates on family law and civil rights with cases ranging from representation of children endangered by their public custodians to contested custody matters, grandparent, and psychological parent rights.

I recently challenged the Oregon law aimed at protecting elderly and disabled persons from abuse, and the court agreed that part of the statute was in conflict with the right to free speech.

The statute—entitled “The Elderly Person and Persons with Disabilities and Abuse Prevention Act (EPPDAPA)— was modeled on the long-established Oregon Family Abuse Prevention Act (FAPA), but went even further to limit the ability of persons to use speech to threaten or cause harm to an elderly or disabled person. In particular, one section of the statute prohibited the:

*“Use of derogatory or inappropriate names, phrases or profanity, ridicule, harassment, coercion, threats, cursing, intimidation or inappropriate sexual comments or conduct of such a nature as to threaten significant physical or emotional harm to the elderly person or person with a disability.”*

I challenged this section in a recent case in Clackamas County that involved a woman, her daughter, and her grandchildren. The daughter, who is deaf, had a boyfriend who was abusive to her and her children. She asked for and got help from her mother, who acquired temporary care of the children. In the course of events, the grandmother expressed her concerns about the abusive situation via e-mails and text messages and stated that she would report matters to the Department of Human Services (DHS).

Ultimately, DHS returned the children to their mother after she promised that her boyfriend would no longer lock them in the bedroom. She then cut off the grandmother from all contact with the children and, influenced by her boyfriend and his family, got an EPPDAPA restraining order against her own mother, alleging that her e-mail and text communications were a threat to her—a person with a disability.

I challenged the EPPDAPA order on the basis that both the free speech limitation as well as the specific conduct alleged in this case violated the grandmother’s constitutional rights to free speech under the Oregon and Federal Constitutions.

Judge Deanne Darling agreed, finding:

*“That portion of EPPDAPA, specifically ORS 124.005(1)(e) which provides for relief against ‘the use of derogatory or inappropriate names, phrases or profanity, ridicule, harassment, coercions, threats, cursing, intimidation or inappropriate sexual comments or contact of such a nature as to threaten significant physical or emotional harm to the elderly person or person with disability’ is unconstitutional on the basis of overbreadth and because it encroaches into state and federal constitutionally protected free speech.*

*“A narrowing construction of the statute to save it from overbreadth is not possible if the Court is to, as required, maintain ‘reasonable fidelity to the legislature’s words and apparent intent.’ The Legislature has given the Court no guidance on how to narrow the statute without infringing on constitutionally protected free speech activity.*

*“Independent of the overbreadth infirmity, that portion of the statute referenced above, as applied to the facts alleged by Mother, is unconstitutional as applied. The digital text alleged by Mother in her Petition and specifically the text that has been placed into evidence is not a derogatory or inappropriate phrase, an inappropriate name or profanity or ridicule. Such evidence is not harassment and not coercion. While such digital text could be read as a threat, the Court finds on an objective basis that such digital text message is not a threat. The text message...to Mother did not threaten physical or emotional harm and could not be fairly read or interpreted to threaten physical or emotional harm. Mother was not credible regarding her fear from the text messages that she received from Grandmother.*

*“The statement by Grandmother that ‘you will go to jail’ is not a threat that Grandmother had any ability to execute. The digital text of concern to Mother from Grandmother included a threat to call the Department of*

Continued on page 8

## Abuse statute challenged

*Continued from page 7*

For further information about this case, contact:

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*Human Services based upon Grandmother's belief that Mother's children were threatened with abuse. However, the Court finds, based upon the legislature's intent to protect children from abuse in the community and its granting of immunity to those persons who make child abuse complaints through the mandatory reporting system, that a threat or statement that 'I will call DHS' can never give rise to relief in and of itself under this statute."*

The effect of this order is specifically limited only to the particular case in which it was raised unless it reaches the Oregon Court of Appeals or the Oregon Supreme Court.

While the statute is well-intended, the speech-related portion violates constitutional

liberties. It is hoped that the statute could be re-written to protect elderly and abused persons without sacrificing individual liberties.

The legislature may have the opportunity to amend the statute in the next session. The unconstitutional portion of the statute could be saved if speech subject to the statute:

- instilled in the recipient a fear of imminent, serious, and personal violence
- expressed author's intention that the threat will be executed and author has the ability to execute
- is unequivocal
- is objectively likely to be followed by unlawful acts. ■

## Photos from Elder Law Section unCLE program

May 7, 2010  
Eugene, Oregon

*CLE Subcommittee members Whitney Yazzolino of Portland and Mark Williams of Eugene welcome Section members.*



*Photos courtesy of Penny Davis*



*Lane County Circuit Court Judge Lauren Holland makes a point while talking with Steve Skipton of Eugene during a break.*



## Forensic accounting in cases of financial abuse

This article is based on a conversation between Gregson Parker, CPA/CFP, CFE, and Carole Barkley, Elder Law Newsletter Editor



*Gregson Parker has been a CPA for more than 30 years and is Certified in Financial Forensics. He has been a Certified Fraud Examiner since 1993. He founded Forensic Accounting Services in Portland in 1989. The firm specializes in litigation support services, insurance claims analysis, and fraud investigations.*

### **W**hat does a forensic accountant do?

Although this is a niche of public accounting, a variety of services are included. The American Institute of CPAs defines Forensic Accounting practice areas as:

- Economic Damage Calculations
- Fraud Prevention, Detection, and Response
- Computer Forensic Analysis
- Business Valuations
- Financial Statement Misrepresentations
- Bankruptcy, Insolvency, and Reorganization
- Family Law

My practice is focused on the first two categories, for both litigation and insurance claims.

### **How might a forensic accountant get involved in a case of financial elder abuse?**

A CPA or other accountant, tax preparer, or bookkeeper might notice something as a result of his or her own scrutiny. The involvement might come in the course of preparing taxes, financial statements, or financial planning.

Or a client might believe something is amiss with an elderly parent's or other relative's finances.

A family member might note that a caretaker with power of attorney is now driving around in a Mercedes, even though he doesn't have any other income source. It may be a situation among siblings where one is prematurely – and without authorization – drawing down on an expected inheritance, and his sister does not feel that he is entitled to it. She may see it as, "My older brother has always taken advantage of me and here he is doing it again."

As a forensic accountant without a "traditional" client base, I will get called in when someone suspects a problem and is aware that I have expertise to analyze it.

### **Who has the authority to hire you?**

Anyone can hire me. Whether or not he or she will have access to the records we need to evaluate depends on the client's relationship with the victim. If it's law enforcement, they can use court orders or subpoenas to get bank, credit card, brokerage, and other financial records. If it's a concerned friend or relative, that person won't have a legal right to the records. Through the relationship with the suspected victim, he or she may be able to obtain what's needed.

### **How common is financial abuse of elders?**

Nationally, elders lose more than \$2.5 billion each year to financial abuse and exploitation. There aren't enough resources, law enforcement or otherwise, to address this problem, and it's a heartbreaking tragedy in our society.

### **What kind of situations happen in financial abuse?**

An elder may think he or she is "helping" an adult child or grandchild, but in reality that young person is raiding the elder's account – to feed a drug habit or gambling addiction, or just to support himself, often lavishly.

The family abuse situations are some of the most challenging for a combination of reasons. The elder may be willing to provide some financial support, but is not aware of the extent of support that he or she is paying for. It is often difficult to get reliable information from the victim, who may have some level of dementia and may not remember what he or she had said was okay or not okay. Elders are typically embarrassed about being unable to remember what was agreed to.

There is also the matter of inheritance. There may be a sense of entitlement on the part of the heir-to-be, who thinks, "Well I'm going to get it anyway and I need it now! I can't wait until they die, and I'm not poisoning them. I'm just getting what's mine a little bit early."

## Forensic accounting

*Continued from page 9*



*Elders are typically embarrassed about being unable to remember what was agreed to.*

You also find situations where the abuser has obtained a power of attorney and has taken over the elder's financial affairs altogether. Mom still has access to her brokerage account, but it's empty because her daughter got a power of attorney and transferred all the funds to her own account. Mom's account has been hijacked, and she likely has no idea whether she spent her money, her daughter took it, or her broker took it.

### **Who are the usual suspects? Who commits elder financial abuse?**

The most common perpetrators are family members. It may also be a professional caretaker who realizes that nobody is paying attention, and just becomes more and more helpful. "Not only will I mow the lawn and prepare your meals, but I can balance your checkbook, too. And I'll go to the store; give me your ATM card and your PIN so I can get cash to buy your groceries."

Or it may be just an opportunist, e.g., the neighbor who realizes the person living next door is now a widow or widower who has no family members coming around. He knows the person is lonely, so he goes over and befriends the elder. He never had any use for her or him before, but knows the elder has money, so goes over to help out, and the next thing you know is helping himself.

### **Is there a particular department or authority in the legal system that one would go to with this kind of complaint?**

There are various resources in the community:

- Adult Protective Services is an excellent contact. They coordinate with all the players and can make appropriate referrals or call in law enforcement.
- In Multnomah County, the elder abuse hotline is 503.988.3646.
- The statewide number for reporting elder abuse of any kind is 800.232.3020.
- Directly contacting local law enforcement is another option.

### **Can a person be prosecuted even if the elderly victim doesn't want to or can't testify?**

The victims often make poor witnesses. They are forgetful and get rattled, so they are not able to testify with much credibility.

It's my understanding that if the District Attorney has determined that a crime has been committed, the elderly person is not required to testify – particularly in a situation where the person has limited mental capability and would not be deemed competent to know or remember what has happened.

### **So testimony would involve someone like you?**

It might. It becomes a matter of documentation and evidence, as opposed to the victim's testimony.

Typically we are looking at the periods before, during, and after the alleged abuse. For example, if we can show that Grandma's maintenance costs were \$3,000 a month before her grandson became her caretaker, \$12,000 a month while he was there, and only \$4,000 a month after he was removed, we can present a very compelling picture.

In most cases with that kind of evidence, the DA works out a plea agreement with the abuser, and it doesn't go to trial. You won't need witnesses and don't need to expose the family's dirty laundry on the public record.

### **Is there ever any way to get the money back?**

Very rarely. Typically, it's gone: to a video poker machine, in a drug dealer's pocket, or for a fancy car that's wrapped around a telephone pole. The best you can hope for is to stop the bleeding. And even if restitution is ordered, it will depend on the abuser earning enough to pay back the victim in his or her lifetime.

Occasionally (but less frequently than a few years ago) there may be some culpability on the part of a financial institution. You may have recourse against it if it was negligent about forged signatures or unauthorized transfers. But that's a long shot; most of the time there just isn't any realistic chance of recovery.

*Continued on page 11*

## Forensic accounting

*Continued from page 10*

Unlike a business embezzlement with employee theft coverage, there is no insurance for these situations.

### **You can't take out insurance against your relatives?**

It's not covered under homeowner's or any other type of insurance that I'm aware of.

### **How does a forensic accountant build a case?**

Often, we will direct a client to get a complete set of financial records. Maybe they have a bank statement from 2007, three from 2008, and four from 2009. Then we'll ask the account owner or the power of attorney to provide a more complete set. We may need to get authorization to talk to someone at the financial institution if it is not clear from the statements what they mean or what really happened to the funds.

Occasionally, we can get the perpetrator's cooperation if that person is maintaining his innocence and is willing to provide his bank records to demonstrate it. But to get the records of another person usually takes the involvement of law enforcement.

In a non-elder embezzlement case, the embezzler puts a lot of effort into covering their tracks, destroying data, altering records, and making it as difficult as possible to retrace what they have done. The good news with the financial abuse of elder cases is that the abusers typically don't think they are going to get caught. They don't think anyone will ever suspect what they are doing. They are usually less sophisticated as well as less concerned about the audit trail they are leaving behind. So when we do get the records, we are in a much better position to build the case without having to do a lot of reconstruction and filling in the blanks. It's all just laid out.

For example, the records might show that Grandma used to go to Shari's for lunch every

Tuesday. After grandson Bobby began living with her, Grandma started going to Morton's four nights a week with eight people and running up \$400 bar bills. Bobby and his drinking buddies pile into their cars and Bobby hauls Grandma down to the restaurant and sits her at the corner of the table. They are all having their drinks and \$100 steaks, and Grandma *is* there. But that's not what she wants to do. She wants to go to Shari's for lunch on Tuesday! That's not an uncommon situation.

### **How would you even know about this kind of expense?**

It's usually on a credit or debit card. It may be the elder's card, but the abuser has been added as an authorized signer. It's not hard to add a person to your credit card. Or it may be charged to the abuser's card, but the credit card bill is paid from the elder's bank account.

Again, we often have the advantage that they don't think they are going to get caught, so they don't even try to hide it. In a lot of these cases, it's just right there — low-hanging fruit. We get the detail, examine the transactions, and the record speaks for itself. Our task is to analyze and organize the information, and create worksheets which can be used as demonstrable evidence.

### **How many people are there who do your work? How does one find a forensic accountant?**

In Oregon, there are probably no more than a dozen CPAs who do forensic accounting more than occasionally. I don't know of any that do a significant amount of work on elder abuse cases. Few accountants get involved in these cases because there is so little money in it, as opposed to commercial fraud. I would be surprised if anyone lists elder abuse forensic accounting as a specialty.

Some members of the Association of Certified Fraud Examiners do forensic accounting. The Oregon CFE Web site ([www.oregon-acfe.org](http://www.oregon-acfe.org)) has a member directory. But a lot of these people are either in private industry, working for corporations as internal auditors, or they are in law enforcement and are not available for private assignments.

The elder abuse work I do for criminal cases is usually pro bono. Few law enforcement agencies and district attorneys are adequately funded to hire forensic accountants for the expertise they need to document their cases.

Sometimes I get hired by family members or others, so that work is chargeable. Again, without minimal chance of recovery, it may not be cost-effective to pursue civil litigation. But clients may be able to prevail on the victimizers if they can present clear and compelling evidence of the financial abuse that has taken place. And forensic accountants can help develop and produce that evidence. ■

## Signs of financial abuse of an elder

Some of the indicators of financial exploitation can be explained by other causes or factors and no single indicator can be taken as conclusive proof. Rather, one should look for patterns or clusters of indicators that suggest a problem.

The National Committee for the Prevention of Elder Abuse lists these red flags:

- Unpaid bills, eviction notices, or notices to discontinue utilities
- Withdrawals from bank accounts or transfers between accounts that the older person cannot explain
- Bank statements and canceled checks no longer come to the elder's home
- New "best friends"
- Legal documents, such as powers of attorney, which the older person didn't understand at the time he or she signed them
- Unusual activity in the older person's bank accounts, including large, unexplained withdrawals, frequent transfers between accounts, or ATM withdrawals
- The care of the elder is not commensurate with the size of his/her estate
- A caregiver expresses excessive interest in the amount of money being spent on the older person
- Belongings or property are missing
- Suspicious signatures on checks or other documents
- Absence of documentation about financial arrangements
- Implausible explanations given about the elderly person's finances by the elder or the caregiver
- The elder is unaware of or does not understand financial arrangements that have been made for him or her

Judge Katherine Tennyson of Multnomah County Circuit Court suggests these signs of something amiss:

- Significant withdrawals from the elder's accounts
- Sudden changes in the elder's financial condition
- Items or cash missing from the senior's household
- Suspicious changes in wills, power of attorney, titles, and policies

- Addition of names to the senior's signature card
- Unpaid bills or lack of medical care, although the elder has enough money to pay for them
- Financial activity the senior couldn't have done, such as an ATM withdrawal when the account holder is bedridden
- Unnecessary services, goods, or subscriptions

Althea Rodgers, Consumer Outreach Coordinator for the Office of the Attorney General, Oregon Department of Justice, says that she frequently comes across scams that target elders. She warns that if an elder falls into any of these categories, it is a big sign they have given (and probably still are giving) money to scam artists:

- An inordinate amount of "charity" solicitations via mail. Some elders receive dozens a day – many if not most of these "charities" are frauds. Many of the elders targeted are lonely, live in retirement homes, and look forward to receiving their mail. These fake charities know this, and send very compelling letters.
- Frequent telephone solicitations for money. A common tactic is to call and "follow-up" on the "pledge of support" the elder made the month prior. The scammer relies on the fact that the elder is lonely, enjoys the phone conversation, and will just assume he or she is having "a senior moment" and forgot about the pledge. Of course, no pledge was ever made.
- Any withdrawal of cash to send a money order, when asked to do so by another. Business is not conducted through money orders. A common scam against elders is the "grandparent scam," where scammers will call, posing as a grandchild in an emergency who needs cash wired immediately.
- Frequent requests for foreign lotteries/sweepstakes. All are illegal and often associated with organized crime. ■

## Health care bill targets elder abuse

The new federal health care law includes \$777 million, spread over the next four years, for programs to prevent and prosecute elder abuse.

The provisions in the law are all but identical to those in the Elder Justice Act, which was championed by the National Center on Elder Abuse and its coalition partners for more than 30 years, through Congressional hearings and four failed attempts, despite bipartisan support, to get the bill to the Senate floor.

Under the new plan, state and local adult protective service programs will have the first dedicated financing stream from the federal government. These agencies investigate reports of abuse, neglect, and financial exploitation of elderly and disabled adults, and ensure the safety of those proven to have been victimized.

The act provides financing for 1,700 new investigators of elder abuse around the country, for state demonstration grants to test various new approaches to adult protective services, to support existing state ombudsmen and to train new ones to investigate complaints related to long term care facilities, including assisted living facilities and nursing homes. ■

*Source: New York Times (April 23, 2010)*

## Resources for elder law attorneys

### CLE seminars

**Estate Planning for Nontraditional Families**  
OSB "Quick Call" Teleseminar  
August 10 & 11, 2010; 1 10 a.m. to 11 a.m.  
[www.osbar.org](http://www.osbar.org)

**Health Care & Estate Planning: Vital Issues at Each Stage of Planning Process**  
OSB "Quick Call" Teleseminar  
September 8, 2010; 10 a.m. to 11 a.m..  
[www.osbar.org](http://www.osbar.org)

### NAELA Telephonic Training Programs

**Tax Issues in Settling Estate Disputes**  
August 26, 2010  
11:00 a.m. to 12:30 p.m. PT

**Time Matters - Tips & Tricks Staff Requirements**  
September 14, 2010  
11:00 a.m. to 12:30 p.m. PT

**Medicare's Interest in Personal Injury Award: What Elder Law Attorneys should know about Medicare Set-aside Requirements**  
October 5, 2010  
11:00 a.m. to 12:30 p.m. PT

**Boomers – The Next 20 Years**  
October 14, 2010  
11:00 a.m. to 12:30 p.m. PT

**More for Me, Less for Uncle Sam – Tax Planning for Seniors**  
November 16, 2010  
11:00 a.m. to 12:30 p.m. PT

**What to do When Your Client Has Died: A Tax Guide to Administration**  
December 16, 2010  
11:00 a.m. to 12:30 p.m. PT  
[www.naela.org](http://www.naela.org)

### Conferences

**NAELA Fall Institute**  
*Protecting your Clients; It's a Zoo out There*  
November 4 to 6, 2010  
Sheraton San Diego Hotel & Marina  
San Diego, California  
[www.naela.org](http://www.naela.org)

**2010 National Aging & Law Conference**  
*The Changing Face of Aging*  
December 9 to 11, 2010  
Westin Hotel  
Alexandria, Virginia  
[new.abanet.org/aging](http://new.abanet.org/aging)

### Article

*Marrying for the Money: A New Twist?*  
Courts refuse to allow caregivers who married their incapacitated clients to get an elective share of the clients' estates  
Trusts and Estates Web site  
[http://trustsandestates.com/wealth\\_watch/caregiver-elective-share-berk-campbell-0421/index.html](http://trustsandestates.com/wealth_watch/caregiver-elective-share-berk-campbell-0421/index.html)

### Web Sites

**The National Committee for the Prevention of Elder Abuse (NCPEA)**  
[www.preventelderabuse.org](http://www.preventelderabuse.org)

**The National Center on Elder Abuse (NCEA)**  
[www.ncea.aoa.gov](http://www.ncea.aoa.gov)

**Multnomah County Aging & Disability Services**  
*Preventing Elder Abuse*  
[www.multco.us/elderabuse](http://www.multco.us/elderabuse)

**The Elder Justice Coalition**  
[www.elderjusticecoalition.com/index.htm](http://www.elderjusticecoalition.com/index.htm)

### Helpguide

*Elder Abuse and Neglect*  
[helpguide.org/mental/elder\\_abuse\\_physical\\_emotional\\_sexual\\_neglect.htm#signs](http://helpguide.org/mental/elder_abuse_physical_emotional_sexual_neglect.htm#signs)

**Elder Law Section Web site**  
[www.osbar.org/sections/elder/elderlaw.html](http://www.osbar.org/sections/elder/elderlaw.html)

The Section Web site has useful links for elder law practitioners, past issues of the *Elder Law Newsletter*, and current elder law numbers.

### Elder Law Section electronic discussion list

Send a message to all members of the Elder Law Section distribution list by addressing it to: [eldlaw@lists.osbar.org](mailto:eldlaw@lists.osbar.org).

Replies are directed by default to the sender of the message *only*. If you wish to send a reply to the entire list, you must change the address to: [eldlaw@lists.osbar.org](mailto:eldlaw@lists.osbar.org) – or you can choose "Reply to all." ■



**Important  
elder law  
numbers**

as of  
January 1, 2010

<b>Supplemental Security Income (SSI) Benefit Standards</b>	Eligible individual.....\$674/month Eligible couple ..... \$1,011/month
<b>Medicaid (Oregon)</b>	Long term care income cap.....\$2,022/month Community spouse minimum resource standard ..... \$21,912 Community spouse maximum resource standard .....\$109,560 Community spouse minimum and maximum monthly allowance standards .....\$1,822/month; \$2,739/month Excess shelter allowance ..... Amount above \$547/month Food stamp utility allowance used to figure excess shelter allowance .....\$385/month Personal needs allowance in nursing home.....\$30/month Personal needs allowance in community-based care .....\$152/month Room & board rate for community-based care facilities..... \$523.70/month OSIP maintenance standard for person receiving in-home services..... \$675.70 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2008 .....\$6,494/month
<b>Medicare</b>	Part B premium ..... \$96.40/month* Part B deductible ..... \$155/year Part A hospital deductible per spell of illness.....\$1,100 Part D premium: .....Varies according to plan chosen Skilled nursing facility co-insurance for days 21-100 .....\$137.50/day

\* For those already enrolled. \$110.50 for new enrollees. A person whose income is more than \$85,000/year will pay a higher premium.



**Elder Law  
Section**

**Newsletter Board**

The *Elder Law Newsletter* is published quarterly by the Oregon State Bar’s Elder Law Section, Sylvia Sycamore, Chair. Statements of fact are the responsibility of the authors, and the opinions expressed do not imply endorsement by the Section.

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