



Joseph A. Cipparone is an attorney with Cipparone & Zaccaro, PC, in New London. He is a Fellow of The American College of Trust & Estate Counsel (ACTEC) and the former President of the Connecticut Chapter of the National Academy of Elder Law Attorneys (NAELA). He serves on the Executive Committee of both the CBA Estates & Probate Section and the CBA Elder Law Section.

Causes of Action for Financial Exploitation of Seniors

By Joseph A. Cipparone



Financial exploitation of seniors takes many forms and has many different perpetrators. It can involve a caregiver who works for an agency who has taken withdrawals from the senior's account to make presents to her family members. A family member who provides care for her mom may take cash, valuable paintings, or heirloom jewelry because she feels she deserves compensation. It can involve an attorney, financial adviser, or accountant using a senior's power of attorney to transfer funds from a client's account to his or her own account.

When a theft is discovered, family members come to lawyers to recover the funds. Typically, it is *not* the senior who comes to the lawyer. The elder often feels embarrassed that he or she was duped or intimidated. He or she tends to have a dependent rela-

tionship with the perpetrator either financially or emotionally. Indeed, it is so difficult to convince a senior to pursue his or her perpetrator that cases of recovery tend to commence after the senior has died.

What can a lawyer do in our civil courts to recover the funds taken? Public Act 15-236 creates a cause of action for financial exploitation that allows recovery of not only actual damages but punitive damages and reasonable attorneys' fees.¹ An elderly person, a conservator for the elderly person, an agent under a power of attorney, an organization acting for the elderly person, or an executor of a deceased elderly victim may bring the action in Connecticut Superior Court.²

What if the perpetrator is the agent under the power of attorney? The family can seek removal of the agent under the new Connecticut Uniform Power of Attorney Act.³ Section 16 of Public Act 15-240 gives interested parties the power to petition for review of the agent's conduct, filing an accounting, and seeking appropriate relief. The family may also petition for involuntary conservatorship and seek removal of the agent under the power of attorney.⁴ Under Public Act 15-240, the court can limit, suspend, or terminate an agent under a power of attorney if it has appointed a conservator.⁵ The new agent or conservator could then bring the action under P.A. 15-236 against the former agent.

What if the perpetrator is the executor of the decedent's estate? The beneficiaries of the estate would likely oppose the appointment of the executor. Certainly, evidence of or allegations regarding the executor stealing from the decedent would persuade a court that removal and/or appointment of another person as executor best serves the interest of the estate because of the unfitness, unwillingness, or persistent failure of the executor to administer the estate effectively.⁶ The successor executor or the administrator if there is no successor under the Will would then have the power to pursue relief under Public Act 15-236 for return of the funds.

Public Act 15-236 allows a victim to obtain an order "prohibiting the defendant from transferring, depleting or otherwise alienating or diminishing any funds, assets or property."⁷ This remedy could accompany other prejudgment remedies under Connecticut General Statutes § 52-278a through § 52-278n. Those other prejudgment remedies include disclosure of the perpetrator's assets.⁸

Note that the definition of elderly person under Public Act 15-236 includes anyone over the age of 60.⁹ Thus, attorneys can use this new law to protect people not usually considered "elderly." Punitive damages often cover litigation costs which may exceed reasonable attorneys'

fees.¹⁰ Depending on the assets available for recovery, an attorney may decide to take a financial exploitation case even if the litigation costs will exceed the actual damages.

In addition to creating a new civil cause of action, Public Act 15-236 can alter the disposition of a decedent's estate. The new law prohibits *any* property from passing to the perpetrator of financial exploitation in the estate of a deceased victim.¹¹ The new law amended C.G.S. § 45a-447 to prevent not only murderers from inheriting from a deceased victim but thieves as well. For the first time, those who are found guilty of committing larceny¹² as defined in C.G.S. § 53a-122 (larceny in the first degree) or §53a-123 (larceny in the second degree) "shall not inherit or receive any part of the estate of ... the deceased victim."¹³ Larceny in the second degree includes the wrongful taking of property from anyone over the age of 60 regardless of its value!¹⁴

The new law enforces this disinheritance by considering the perpetrator as having predeceased the victim under a Will or intestacy.¹⁵ It also severs the tenancy of jointly held real estate. The act converts the joint ownership of investments and other personal property to sole ownership by the victim. The perpetrator is considered to have predeceased the victim for life insurance policies or annuities as well.¹⁶

What this expansion of C.G.S. § 45a-447 means is that a small theft could cause the perpetrator to lose all of his or her inheritance even if the estate is worth exponentially more than the property taken. The new act recognizes this potential inequity. It gives the perpetrator the right to petition the Superior Court to override the prohibitions on inheriting if overriding the prohibitions would "fulfill the intent of the deceased victim or that application of such prohibitions would be grossly inequitable under all of the circumstances."¹⁷

In the author's experience, the Chief State's Attorney's Office does not give high priority to these larceny cases usually be-

cause the victim has died and only money is involved. Consequently, it can take years to get a conviction on larceny. This prosecutorial delay coupled with the costs of litigation lessens the chance that an attorney will take an inequitable case.

For life insurance policies or annuities, the new law allows an exception to the requirement of a conviction. In the absence of a conviction, the Superior Court may determine by the common law, including equity, whether the named beneficiary on the annuity or life insurance policy is entitled to any benefit under the annuity or policy.¹⁸ The person challenging the eligibility of a named beneficiary for benefits under an annuity or life insurance policy has the burden of proof.

What if the perpetrator has also died? Public Act 15-236 allows the Superior Court to make a determination by the preponderance of the evidence that perpetrator who was the heir or beneficiary of the deceased victim would have been adjudged guilty of larceny.¹⁹

The new Connecticut Uniform Power of Attorney Act also creates a cause of action for the principal or the principal's successor in interest (i.e. – heirs and beneficiaries) to restore the value of the principal's property to what it would have been if the agent had not violated the law.²⁰ The plaintiff can also recover reasonable attorneys' fees and costs to restore the property. Public Act 15-240 also expands the parties who can petition for review of the agent's conduct.²¹ The new Act not only gives the principal, the agent, and the principal's legal representatives (i.e. – conservator, executor, or administrator) the power to petition for an accounting and other relief as provided in the current version of C.G.S. § 45a-175, it also gives that power to (i) the principal's spouse, parents, descendants, heirs, beneficiaries, or caregivers, (ii) an agent under an Appointment of Health Care Representative, (iii) the Connecticut Dept. of Social Services Protective Services for the Elderly, and (iv) any person (e.g.- a bank, nursing home, etc.) asked to accept the power of attorney.²²

Besides an accounting, appropriate relief could include discovery under Rule 61 of the Probate Court Rules of Procedure. Public Act 15-240 is not effective until July 1, 2016, but this author is not aware of any proposal to eliminate these groundbreaking provisions.

Besides these new statutory causes of action, counsel for the victim's family should pursue existing statutory causes of action. There are statutory causes of action for statutory theft under CGS § 52-564 and unfair trade practices under the Connecticut Unfair Trade Practices Act (CUTPA). Statutory theft requires a showing that the perpetrator wrongfully obtained or withheld property from the senior with the intent to permanently deprive her of the property or to appropriate the same to himself or a third person.²³ The plaintiff can receive treble damages under statutory theft so it is a powerful remedy. To show unfair trade practices under CUTPA, the plaintiff must prove that the perpetrator provided services to the senior as part of his or her trade, that the misconduct offends public policy and the plaintiff suffered actual damages due to the misconduct.²⁴ Passage of Public Act 15-236 supports the proposition that stealing from the elderly offends public policy. A plaintiff who can show unfair trade practices can receive punitive damages and reasonable attorneys' fees as well as actual damages.²⁵

Lawyers representing victims of financial exploitation should not overlook causes of action allowed under the common law. Common law causes of action for financial exploitation include conversion, undue influence, unjust enrichment, breach of contract, breach of fiduciary duty and constructive trust. Conversion occurs when the perpetrator deprives a victim of property, the perpetrator uses the property for himself or others, the victim demands return of the property, and the perpetrator refuses to return the property.²⁶

Undue influence occurs when a person in a confidential relationship with a senior who has diminished capacity or is susceptible to influence and intimidation exerts control over the senior.²⁷ The plaintiff must show that the perpetrator had opportunities to exert undue influence and

used those opportunities to convince the senior to make gifts or leave an inheritance to the perpetrator.²⁸

To allege unjust enrichment, the plaintiff must plead that the defendant received property of the senior, the defendant was enriched from the property and it would be unjust for the defendant to retain possession of the property.²⁹ To allege breach of contract, the plaintiff must prove an agreement to provide services, consideration, a failure to provide the agreed services and damages.³⁰ A victim can recover for unjust enrichment or breach of contract even if the victim cannot prove the perpetrator intentionally engaged in misconduct.

If an attorney or an agent under a Durable Power of Attorney or a Conservator takes property from a senior, the perpetrator has breached his or her fiduciary duty. A fiduciary has a duty of loyalty and honesty, an obligation to act in good faith and in the beneficiary's best interest.³¹ By taking property of the senior, the perpetrator engages in self-dealing and advances his or her own interests to the detriment of the senior. The plaintiff must prove damages to recover for breach of fiduciary duty.

Finally, the plaintiff seeking return of misappropriated property can claim constructive trust. A constructive trust arises whenever a perpetrator appropriates property and liquidates it or when a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were to retain it.³² A common constructive trust action involves a senior conveying real estate to the perpetrator.³³

With the passage of Public Act 15-236 and Public Act 15-240 the Connecticut General Assembly has shown it is serious about stopping and redressing financial exploitation of the elderly. It should convince those who serve as a caregiver or a fiduciary that taking property from the elderly will result in serious consequences. With the many statutory and common law causes of action available to redress financial exploitation, Connecticut attorneys should have greater incentive to take these cases and seek justice for the family.

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Notes

1. Conn. Public Acts 2015, No. 15-236, Section 3(a) [hereinafter PA 15-236]. The law became effective October 1, 2015.
2. *Id.*
3. Conn. Public Acts 2015, No. 15-240 [hereinafter PA 15-240]. The law becomes effective July 1, 2016.
4. Conn.Gen.Stat. §45a-175(d) as amended by PA 15-240, Section 47.
5. PA 15-240, Section 8(b).
6. Probate Litigation in Conn. § 4:9 (2d ed.); Conn. Gen. Stat. §45a-242
7. PA 15-236, Section 3(b)
8. Conn. Gen. Stat. §52-278n
9. PA 15-236, Section 1
10. *See e.g., Nelson v. Tradewind Aviation, LLC*, 155 Conn.App. 519, 111 A.3d 887 (2015)
11. PA 15-236, Section 4
12. A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from the owner. Conn. Gen. Stat. §53a-119.
13. PA 15-236, Section 4(a)(1)
14. Conn. Gen. Stat. §53a-123(5)
15. PA 15-236, Sections 4(a)(2), 4(a)(3) and 4(a)(4)
16. PA 15-236, Sections 4(c)
17. PA 15-236, Section 4(d)
18. PA 15-236, Section 4(c)(2)(C)
19. PA 15-236, Sections 4(a) and 4(c)
20. PA 15-236, Sections 17
21. PA 15-240, Sections 16
22. *Id.*
23. *Gates v. Cartwright*, 2012 WL 6901151 at 4, 55 Conn.L.Rptr 240 (Conn. Superior Ct., JD New London 2012).
24. *See e.g., Anderson v. Schoenhorn*, 89 Conn. App. 666, 874 A.2d 798 (2005).
25. Conn. Gen. Stat. §42-110g
26. *Jarvis v. Lieder*, 117 Conn. App. 129 (2009).
27. *Berkowitz v. Berkowitz*, 147 Conn. 474, 162 A.2d 709 (1960).
28. *Tyler v. Tyler*, 151 Conn.App. 98, 93 A.3d 1179 (2014).
29. *Jarvis v. Lieder*, *supra* at 144; *Reed v. McCready*, 2014 WL 2854001 at 3 (Conn. Superior Ct., JD Fairfield 2014).
30. *Connecticut Education Association, Inc. v. Milliman Usa, Inc.*, 105 Conn.App. 446, 938 A.2d 1249 (2011)
31. 16 Connecticut Practice Series, Elements of An Action §8.7 (Westlaw 2011); *Dunham v. Dunham*, 204 Conn. 303, 528 A.2d 1123 (1987)
32. *Jarvis v. Lieder*, *supra* at 131; *Mead v. Panciera*, 2012 WL 6122147 at 3 (Conn. Superior Ct., JD Windham 2012).
33. *See e.g., Cohen v. Cohen*, 182 Conn. 193, 438 A.2d 55 (1980); *Jarvis v. Lieder*, *supra* at 131.