



BY JESSICA M. MOELLER

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# Balancing Protection:

Defending Adults from Financial  
Abuse While Preserving Dignity



**The incidence of financial abuse of adults at risk and older adults is high and growing. Time is of the essence when these crimes come to light during the victims' lifetime, to preserve evidence and prevent continued victimization. Traditional guardianships for adults and financial service institutions' ability to flag and stop suspicious transactions provide some protection but can unintentionally cause further harm. Spendthrift guardianships can be a middle ground between doing nothing for victims of financial abuse and imposing remedies that deprive victims of all autonomy.**

**T**here is a unique balance at play when discussing the need to protect adults from financial exploitation while also defending their individual rights that may be impeded in the process of implementing those same protections. The crime of financial abuse has grown at a record-breaking pace over the last few decades, with billions of dollars being stolen not just by the colloquial “strangers on the internet” depicted in the news but also by caretakers, trusted advisors, and family members. This crisis is exacerbated by advances in technology, the complexity of financial transactions, and the overburdened judicial system.

When cases of financial abuse are finally brought to light, they can take many months, even years, to resolve. There is a stigma associated with being a victim of financial fraud that often prevents individuals from reporting abuse or seeking assistance. Even if such abuse is reported, victims might lose their ability to remember events and to testify or might pass away before the abuse is rectified. Some offenders count on this.

Guardianships can provide a quick resolution; however, they can also remove significant rights. Some guardianships remove an individual's right to vote, serve on a jury, or even draft a will. There must be a quicker process, one that creates a middle ground. New approaches, often recrafting old techniques, must be utilized. Innovative solutions, such as the spendthrift guardianship, that offer a middle ground between traditional guardianship and complete autonomy could be a way to stop financial victimization while prosecutors build their cases. Regardless, as the need to protect older adults and adults at risk from financial abuse increases, protecting their *individual rights* needs to be a part of that equation.

### **A Growing Population at Risk**

With the introduction of the Elder Justice Act (EJA) in 2010,<sup>1</sup> communities have become more alert to the fact that older adults are facing new challenges. The guiding language in the EJA and the Older Americans Act of 1965<sup>2</sup> generally focuses on people age 60 or older. However, Wisconsin and several other states have broadened these definitions to more accurately depict a demographic of “adults-at-risk” that might be targeted.<sup>3</sup> Even simply evaluating the category of individuals 65 and older, as of 2020, this group included over 55.8 million Americans.<sup>4</sup>

According to an annual report released in 2024 by the U.S. Department of Justice, there were more than 300 enforcement actions in one calendar year that totaled over \$700 million stolen from adults-at-risk.<sup>5</sup> According to FinCEN, adults-at-risk lose an estimated \$3 billion annually to financial fraud.<sup>6</sup> An unfortunate reality is that for every case reported, roughly four or five will go unreported.<sup>7</sup> Often, victims are afraid to report these abuses because of embarrassment or fears that their rights, assets, and individual autonomy will be taken from them.<sup>8</sup>

There are many highly technical scams across the world, including elements such as “phantom hackers,” ransomware, fake text messages, and other false documents. But despite a common perception that third-party scams are the main source of financial abuse, the perpetrator is likely to be someone close to the victim, such as the victim's caregiver or family member.<sup>9</sup> These perpetrators sometimes argue that the money, motor vehicles, real property, or other items were given to them by the victim and that they did not steal.

Not every story makes the news, but glimpses of the destruction that trusted family members and even attorneys can do to vulnerable adults



are provided by situations such as the highly publicized case of Brooke Astor, a New York City resident, who was taken advantage of by her son and caregivers for over \$10 million.<sup>10</sup> Just a year later, another case hit the news: a woman had used her position as manager of several senior-living facilities to take advantage of several adults-at-risk for more than \$100,000.<sup>11</sup> Law enforcement, adult protective services, and other governmental agencies wonder how to get one step ahead of these crimes instead of trailing behind. The key is for these stakeholders to find ways to bridge the gaps between reporting, investigation, and ultimate resolution.

### The Inherent Difficulty in Prosecuting Elder Financial Abuse Cases

As of 2010, many states, including Wisconsin, had enacted specific criminal statutory schemes to address financial abuse of adults-at-risk.<sup>12</sup> Wisconsin has penalty-enhancement statutes, as well as statutes that allow financial services providers to delay certain transactions, or even the release of funds, if they have been alerted to suspected fraud.<sup>13</sup> The struggle remains to create targeted statutes that balance the interests of victimized adults-at-risk with the risk of creating an overreaching criminal code.



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Often, a barrier to prosecuting financial abusers comes with the type of case that it is: adults-at-risk who lack substantial capacity. Many of the obstacles that prevent initial reporting of financial exploitation are the same reasons prosecutors might be wary of filing these cases.<sup>14</sup> Adults-at-risk might be perceived as unreliable witnesses, and not all parties in the criminal justice system are familiar with dementia behaviors, such as “sundowning” (which might occur at different times of day).<sup>15</sup> Unfortunately, it typically takes months to gather and analyze bank records and other statements, and in some cases, victims pass away during that time. Without a victim, many offices are unable to continue the prosecution of the case.

Even with a victim still alive, while an investigation is ongoing, the alleged victim often is still at risk of being manipulated by the financial abuser, who might continue to spend the victim's money. This period between the filing

of the criminal case and its conclusion is the key point when prosecutors, attorneys for the adult-at-risk, and adult protective services can work together.

### From Least Restrictive to Most Restrictive: What Are the Options?

Wisconsin has developed a detailed statutory structure of laws pertaining to older adults and guardianships, which range from least restrictive to most restrictive intervention methods.<sup>16</sup>

On the less restrictive, or less intrusive, side, an adult-at-risk, or any individual, can voluntarily create a power-of-attorney document and entrust their needs to an agent, who can follow through with the individual's specifically stated wishes.<sup>17</sup> However, use of a power-of-attorney document complicates matters if the principal (the individual who drafted the power-of-attorney document) conveys wishes to the agent (the person put in charge by the document) that are against the

principal's own best interests. The agent is left without the necessary tools to protect the principal, and realistically, the power-of-attorney document can be terminated at any time by the principal.

This might be a reassuring thought if the agent is the one who is taking advantage of the adult-at-risk, but it will not be if the agent is the person trying to protect the adult-at-risk from family members or other individuals. An agent is powerless to act against expressed wishes or if the document is terminated. Of note, even though a health-care power of attorney may require medical professionals to "activate" it, powers of attorney do not require a finding of incompetency by the court.<sup>18</sup>

An adult-at-risk might recognize the need for aid and request assistance, believing that powers of attorney will not be sufficient. The individual could request a conservatorship from the court, noting the individual's inability to manage their assets.<sup>19</sup> Akin to a power of attorney, this voluntary option provides the adult-at-risk the opportunity to maintain control over the duration of this authority, and the adult-at-risk can ask the court to terminate the conservatorship. This option also does not carry an indication of incapacity or a legal finding of incompetency.<sup>20</sup>

Other options within the guardianship scheme are generally all *involuntary* and therefore represent a much more restrictive form of intervention. There is, however, a notable difference in language between the typically utilized guardianship of the person or estate for incompetency and that of guardianship of the estate for a spendthrift person. The difference can ultimately be the barrier of proof, a factor that can determine reliability of testimony in the underlying criminal manner, and the overall revictimization of the adult-at-risk: the finding of incompetency and its collateral consequences.<sup>21</sup>

Regardless, all these involuntary guardianships have a much quicker timeline than the typical criminal financial

exploitation case and therefore can serve as that stopgap. These guardianship petitions, once filed, must be resolved within 90 days, swiftly providing assistance and clarity to those involved.<sup>22</sup>

### Guardianships: Help or Additional Harm?

A concern that arises when guardianship petitions are drafted for victims of financial exploitation is that they are being revictimized by a process that is taking away their autonomy. The adult-at-risk might become an unwilling participant in the pending criminal case of their abuser, or the victim's quality of life might be negatively affected because of significant psychological consequences of losing autonomy. Advocates for adults-at-risk have long recognized that as they promote protection for victims of financial exploitation, they must also respect victims and their autonomy.<sup>23</sup>

Undoubtedly, a traditional

guardianship of the estate will stop an adult-at-risk from having access to the individual's bank accounts and therefore from giving away those assets to an abuser. However, that finding of incompetency carries significant weight.<sup>24</sup> This is not the same as a finding of "not competent" in a criminal matter, in which an attorney raises the issues of a defendant's competency and then the defendant is evaluated solely based on that point in time and on the following issues: Can the defendant assist counsel in the defense, and does the defendant understand the charge(s)? In those situations, many individuals regain competency, and they do not carry their lack of competency from one case to the next.<sup>25</sup> Incompetency findings in a guardianship proceeding, however, are much more significant for the rights of the adult-at-risk and usually are permanent.<sup>26</sup> The ward's ability to testify may be questioned. Depending on the

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type of findings of incompetency found, whether for guardianship of the person or of the estate, a variety of rights may be removed as attached to that finding.

Another concern that investigators and advocates might have when protecting victims of financial abuse is that although the adult-at-risk has been seriously manipulated or exploited, and continues to be despite acknowledging such harm, the adult-at-risk might not have the level of impairment that justifies the removal of rights that a guardianship based on incompetency requires. *Impairment* is defined in Wis. Stat. chapter 54 as a developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like incapacity.<sup>27</sup> The limitation of guardianships based on incompetency to individuals with one or more of the specified conditions means the government cannot broadly issue guardianships without checks and balances. However, this also limits possibilities for individuals who have none of the conditions but are being significantly exploited.

### The Balance: Spendthrift Guardianships

Spendthrift guardianships are not new.

In fact, in many states they predated traditional guardianships for incompetency, and some states have gone as far as to eliminate these spendthrift guardianship statutes, often because of lack of general interpretation and overuse in application to guardianship of the *person* contexts.<sup>28</sup> Historically, Wisconsin has used this form of guardianship for circumstances when the proposed ward was a compulsive spender and lacked the ability to control that habit to a wasteful extent but did not appear to be incompetent.<sup>29</sup>

Wisconsin does not have recent appellate court guidance on the use of spendthrift guardianships. However, a quick review of the statutes makes clear that the spendthrift guardianship is a separate and distinct guardianship from the guardianship for incompetency and therefore would not require such a finding.<sup>30</sup> Under a strict reading, Wisconsin's spendthrift statute allows for protection against "other wasteful conduct" that makes the ward "unable to manage effectively [the person's] financial affairs ... so as to endanger [the person's] support ... or expose the public to responsibility for [the person's] support."<sup>31</sup> The remainder of the statute provides significant detail as to

standards of proof and procedure for guardianships of incompetent persons, but addresses spendthrift guardianships with minimal detail.<sup>32</sup>

Some indication of legislative intent is provided by the part of the statute about appointment of guardians, which lists categories of individuals for whom guardianships can be filed.<sup>33</sup> The first focuses on guardianships of minors. The second category of individuals is for "the appointment of a guardian of the estate for an individual if the court finds by clear and convincing evidence that the individual is aged at least 18 years and is a spendthrift."<sup>34</sup> The third category creates separate categories of incompetency for "guardian of the person ... or estate, or both, for an individual based on a finding that the individual is *incompetent* only if the court finds by clear and convincing evidence" that several enumerated factors are true.<sup>35</sup> The second and third categories each provide a list of factors the court should consider. This is further defined later in the statute, which states that an examination of the ward may be ordered to determine "the presence or likely duration of any medical or other condition causing the proposed ward to have incapacity or to be a spendthrift."<sup>36</sup>

When looking at the definition of "spendthrift," one might have initial pause because the statute historically focused on gamblers and people with addictions. However, the key focus and usable language of the definition relies on the fact that because of "other wasteful course of conduct," the adult-at-risk is unable to manage effectively the adult-at-risk's affairs so as to endanger self-support or support of dependents or expose them to public responsibility.<sup>37</sup> The reality is that adults-at-risk who are not incompetent are still being exploited by romance scams, grandparent scams, sweepstakes scams, and so on.<sup>38</sup> These victims are often made aware of the scams perpetrated against them and might initially report the matter to a law enforcement agency, but

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they often are manipulated into continuing to give away assets. There needs to be a stopgap that not only protects victims from further financial exploitation but also does not remove more individual autonomy than is necessary.

Wisconsin courts should consider the spendthrift guardianship as that middle ground and grant petitions for spendthrift guardianships when they are based on substantial evidence. This could include reports drafted by adult protective services personnel or even a court-appointed guardian ad litem, as well as a medical or psychological report that evaluates the condition that at the time categorizes the individual as a spendthrift person – *not as incompetent*.<sup>39</sup> As described within the statutory context, the court can then consider the

desires and needs of the adult-at-risk, additional resources that are available, how permanent the adult-at-risk's situation is, which alternatives have been considered and tried, and, most important, "whether the individual's situation places him or her at risk of abuse, exploitation, neglect, or violation of rights."<sup>40</sup> Ultimately, this puts a guardian in place to protect the adult-at-risk from further financial exploitation and also protects the adult-at-risk from unnecessary findings of incompetency that could take away their individual autonomy.<sup>41</sup>

### Moving Forward

Financial exploitation finally is being widely discussed, but it continues to be an underreported offense. The conversation needs to develop beyond

recognizing the crisis adults-at-risk face for financial exploitation to defined advocacy. Advocacy counsel for wards who are being victimized by financial exploitation and who are alleged to be incompetent, but for whom there is minimal support for a finding of incompetency, should consider suggesting the filing of a middle-ground guardianship such as the spendthrift guardianship. State prosecutors compiling evidence to file a financial exploitation charge can work with county officials to file guardianships to stop further exploitation. In the end, if we are going to work to protect adults-at-risk, it will be a combined effort, from all stakeholders. **WL**

### ENDNOTES

<sup>1</sup>Elder Justice Act of 2009, 42 U.S.C. § 1305.

<sup>2</sup>Older Americans Act of 1965, 42 U.S.C. § 3001.

<sup>3</sup>Wis. Stat. § 46.90.

<sup>4</sup>Zoe Caplan, *U.S. Older Population Grew from 2010 to 2020 at Fastest Rate Since 1880 to 1890*, U.S. Census Bureau (May 25, 2023), <https://www.census.gov/library/stories/2023/05/2020-census-unit-ed-states-older-population-grew.html>.

<sup>5</sup>U.S. Dep't of Just., *Annual Report to Congress on Department of Justice Activities to Combat Elder Fraud and Abuse* (Oct. 2024), <https://www.justice.gov/elderjustice/media/1374366/dl>. During this reporting period, approximately 98% of the cases pursued were criminal, and 31% involved international schemes. These cases amounted to a total of over 225,000 victims.

<sup>6</sup>FinCen Res. Ctr., *Advisory on Elder Financial Exploitation* FIN-2022-A002 (2002).

<sup>7</sup>Kevin E. Hansen, Jonathan Hampel, Sandra L. Reynolds & Iris C. Freeman, *Criminal and Adult Protection Financial Exploitation Laws in the United States: How do the Statutes Measure Up to Existing Research?* 42 Mitchell Hamline L. Rev. 897, 898 (2016).

<sup>8</sup>*Advisory on Elder Financial Exploitation*, *supra* note 6.

<sup>9</sup>Stephanie Bye, *Financial Abuse Typologies*, AFC Challenges: Fraud alert in Focus (Dec. 2023). For an example of caregiver fraud, see U.S. Dep't of Just., *Charlotte Woman and Her Co-Conspirator are Sentenced to Prison for Stealing \$300,000 from an Elderly, Dementia-Afflicted Victim* (May 5, 2021), <https://www.justice.gov/usao-wdnc/pr/charlotte-woman-and-her-co-conspirator-are-sentenced-prison-stealing-300000-elderly>. For examples of third-party scams, see generally *Financial Abuse Typologies*, *supra*; FBI, "Phantom Hacker" Scams Target Senior Citizens and Result in Victims Losing their Life Savings, Sept. 29, 2023, <https://www.ic3.gov/PSA/2023/PSA230929>.

<sup>10</sup>John Eligon, *Brooke Astor's Son Guilty in Scheme to Defraud Her*, N.Y. Times, Oct. 8, 2009, [http://www.nytimes.com/2009/10/09/nyregion/09astor.html?\\_r=1&ref=anthony\\_d\\_marshall](http://www.nytimes.com/2009/10/09/nyregion/09astor.html?_r=1&ref=anthony_d_marshall).

<sup>11</sup>Off. of Att'y Gen. for Dist. of Columbia, *Attorney General Schwalb Successfully Prosecutes Three Financial Exploitation Lawsuits Involving Seniors & Vulnerable Adults* (Aug. 31, 2023), <https://oag.dc.gov/release/attorney-general-schwalb-successfully-prosecutes>.

<sup>12</sup>Shelly L. Jackson & Thomas L. Hafemeister, *Using the Criminal Law to Respond to the Financial Exploitation of Older Adults: The Statutory Evolution in the United States from 2000 to 2020*, 29 Elder L.J. 315 (2022).

<sup>13</sup>Wis. Stat. §§ 943.20(2)(ad), 224.45. The latter statute took effect March 23, 2024.

<sup>14</sup>Andrew Jay McClurg, *Preying on the Graying: A Statutory Prescription to Prosecute Elder Financial Exploitation*. Hastings L.J. vol. 65, issue 4, at 1099, 1117 (2014).

<sup>15</sup>Thomas L. Hafemeister, *Financial Abuse of the Elderly in Domestic Settings*, in *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America* 382, 420 (National Research Council ed., 2003); Charles Sabatino, *Representing a Client with Diminished Capacity: How Do You Know It And What Do You Do About It?*, 16 Clients with Diminished Capacity (2000).

<sup>16</sup>See generally Wis. Stat. chs. 46, 54, 55.

<sup>17</sup>Wis. Stat. §§ 155.05, 155.10, 244.05-.08.

<sup>18</sup>Wis. Stat. §§ 244.04-.09, 155.05(2).

<sup>19</sup>Wis. Stat. § 54.76.

<sup>20</sup>Wis. Stat. § 54.76(5).

<sup>21</sup>See generally Wis. Stat. § 54.10(2), (3).

<sup>22</sup>Wis. Stat. § 54.44(1).

<sup>23</sup>See Robert Butler, *Why Survive: Being Old in America* (Ann Harris ed., 1975).

<sup>24</sup>Wis. Stat. § 54.10(3).

<sup>25</sup>See generally Wis. Stat. § 971.14.

<sup>26</sup>Wis. Stat. § 54.10(3).

<sup>27</sup>Wis. Stat. § 54.01(14).

<sup>28</sup>Rosemary B. Minehan & R. Marc Kantrowitz, *Changes under the Massachusetts Probate Code-Spendthrift Guardianship Eliminated*, 53 Mass. Prac., Mental Health Law § 10.5 (2022).

<sup>29</sup>*Reed v. Reed (In re Reed's Guardianship)*, 173 Wis. 628, 182 N.W. 329 (1921); see also *Taylor v. Koenigstein*, 260 N.W. 544 (Neb. 1935).

<sup>30</sup>Wis. Stat. § 54.10(2).

<sup>31</sup>Wis. Stat. § 54.01(31).

<sup>32</sup>Wis. Stat. § 54.10 (2)(a), (3)(a).

<sup>33</sup>Wis. Stat. § 54.10.

<sup>34</sup>Wis. Stat. § 54.10(2)(a).

<sup>35</sup>Wis. Stat. § 54.10(3)(a) (emphasis added).

<sup>36</sup>Wis. Stat. § 54.36(1).

<sup>37</sup>Wis. Stat. § 54.01(31).

<sup>38</sup>See Internet Crime Complaint Ctr., *Federal Bureau of Investigation Elder Fraud Report* (2023), [https://www.ic3.gov/AnnualReport/Reports/2023\\_IC3ElderFraudReport.pdf](https://www.ic3.gov/AnnualReport/Reports/2023_IC3ElderFraudReport.pdf).

<sup>39</sup>Wis. Stat. § 54.10(1), (2)(a), (b).

<sup>40</sup>Wis. Stat. § 54.10(2)(b), (2)(b)6.

<sup>41</sup>Julie Balovich, *In Their Best Interests: Are Guardianships Toxic to Constitutional Rights?*, 84 Tex. B.J. 974 (2021). **WL**