The University of North Carolina at Chapel Hill

ELDER LAW

INSTITUTE of GOVERNMENT

BULLETIN

Number 3 May 1996

PROSECUTING THE ABUSE, NEGLECT, AND EXPLOITATION OF ELDERLY AND DISABLED ADULTS IN NORTH CAROLINA

■ John L. Saxon*

Almost everyone agrees that the abuse, neglect, and exploitation of elderly and disabled adults is a serious social problem. There is surprisingly little agreement, however, on what constitutes adult abuse or neglect;[1] how many elderly or disabled adults are abused, neglected, or exploited each year;[2] or how families, professionals, social services agencies, or the criminal justice system should respond to adult abuse and neglect.

During the period July, 1994, through June, 1995, county departments of social services in North Carolina confirmed approximately 700 cases involving the abuse, neglect, or exploitation of disabled adults by caretakers in domestic settings.[3] It has been estimated, however, that only one in every fourteen cases of adult abuse or neglect is reported to state aging or adult protective services agencies.[4] If this estimate is correct, there could be as many as 10,000 cases of adult abuse and neglect in North Carolina each year.[5]

In responding to the problem of adult abuse and neglect, North Carolina and other states generally have adopted a two-pronged response. First, most states have enacted adult protective services (APS) statutes.[6] State APS statutes generally require that the suspected abuse, neglect,[7] or exploitation of disabled adults[8] be reported to a state or local social services agency,[9] which is required to investigate the report and provide "protective services"[10] to disabled adults who have been abused, neglected, or exploited.[11] Second, many states have supplemented their APS statutes by enacting criminal statutes punishing the abuse or neglect of elderly or disabled adults by caretakers in domestic and institutional settings.[12]

This bulletin describes North Carolina's new criminal statute (N.C. Gen. Stat. § 14-32.3)[13] regarding the abuse, neglect, and exploitation of disabled or elder adults by caretakers; the prosecution of adult abuse, neglect, and exploitation under other criminal statutes; and the relationship between these criminal statutes and North Carolina's adult protective services law. It is written for adult protective services workers employed by county departments of social services; public and private agencies that administer programs for senior citizens; health care providers and other professionals who provide services to elderly or disabled adults; law enforcement officers; district attorneys; public defenders; and judges.

Criminal Abuse, Neglect, or Exploitation of Elderly or Disabled Adults Under G.S. 14-32.3

In 1995, the North Carolina General Assembly enacted G.S. 14-32.3. The legislation was based in large part on a recommendation by the North Carolina Study Commission on Aging.[14]

Effective December 1, 1995, the law imposes criminal penalties against "caretakers" who abuse, neglect, or exploit elderly or disabled adults who reside in domestic settings.[15]

The elements of the crimes established by G.S. 14-32.3, and the statute's definitions of "caretaker," "elder adult," and "disabled adult" are discussed in more detail in the following sections.

The Definition of "Disabled" and "Elder" Adults Under G.S. 14-32.3

G.S. 14-32.3 applies only if the victim of abuse, neglect, or exploitation is a "disabled adult" or an "elder adult."

Who is a "Disabled" Adult?

The statute defines a "disabled adult" as a person over the age of eighteen (or a legally emancipated minor) who is "physically or mentally incapacitated" due to mental retardation, cerebral palsy, epilepsy or autism; organic brain damage caused by advanced age or physical degeneration in connection with advanced age; or conditions related to accident, organic brain damage, mental or physical illness, or continued consumption or absorption of substances.[16]

It is far from clear, however, what evidence of a victim's physical or mental incapacity is necessary to sustain a conviction under the statute.

The terms "disabled," "physically incapacitated," and "mentally incapacitated" have little or no meaning in the abstract. The terms "disabled" and "incapacitated" generally denote not only a physical or mental impairment, but rather a physical or mental impairment that renders an individual incapable of performing some specific activity or that significantly limits an individual's ability to perform a specific task.[17]

The definition of "disabled adult" in G.S. 14-32.3, however, is silent with respect to the extent or degree of disability or incapacity that is required in order to classify a victim of abuse or neglect as a disabled adult; whether or how a victim's physical or mental impairment must limit his or her functional abilities; and whether there must be some relationship between a victim's physical or mental impairment and the alleged abuse, neglect, or exploitation.

Assume, for example, that a fifty-nine year old woman, who suffers from diabetes or emphysema, is assaulted by her husband or financially exploited by her daughter. It is clear that the victim has a physical impairment. In fact, her physical impairment may be so severe that she is considered totally disabled by the Social Security Administration and is eligible for social security benefits based on her inability to engage in substantial, gainful employment. But does her physical impairment render her incapacitated or disabled within the meaning of G.S. 14-32.3(d)(2)?

The definition of "disabled adult" under G.S. 14-32.3 is virtually identical to the definition of "disabled adult" under North Carolina's adult protective services law [G.S. 108A-101(d)]. Given the similar purposes of these two statutes, it seems likely that, in enacting G.S. 14-32.3, the General Assembly intended to expand the protection afforded to persons who would be considered "disabled adults" under the adult protective services law. The APS law, however, applies only to disabled adults who are "in need of protective services." In order to be in need of protective services, a disabled adult must be unable, as a result of his or her physical or mental incapacity, to obtain medical, social, or other essential services that are necessary to safeguard his or her rights and resources, to maintain his or her physical and mental well-being, or to protect himself or herself from physical mistreatment or exploitation.[18]

Does this mean that in a criminal prosecution under G.S. 14-32.3 the State must prove that the victim's physical or mental incapacity rendered the victim incapable of obtaining "essential services" necessary to maintain his or her physical and mental well-being or protect himself or herself from abuse, neglect, or exploitation? As discussed below, the definition of "elder adult" under G.S. 14-32.3 borrows heavily on the concepts of "need for protective services" and "essential services" found in the APS law. If the same concepts apply to the definition of "disabled adult" under G.S. 14-32.3, it may not be sufficient for the State to prove that a caretaker abused, neglected, or exploited a victim who was physically or mentally incapacitated due to a chronic health problem that significantly limited his or her cognitive or functional abilities.

This reading of G.S. 14-32.3(d)(2) is consistent with statutory definitions regarding the incapacity of victims under two other criminal laws. First, G.S. 14-27.3 and G.S. 14-27.5 make it a crime to engage in sexual intercourse or a sexual act with a person who the defendant knows (or reasonably should know) is "mentally incapacitated" or "physically helpless." For

purposes of these statutes. G.S. 14-27.1 defines "mentally incapacitated" and "physically helpless" as conditions that render the victim mentally or physically unable to resist the rape or sexual offense. Second, G.S. 14-32.1, which makes it a criminal offense to assault a "handicapped person," requires not only that the victim have a physical or mental disability, but also that the victim's disability substantially impair the victim's ability to defend himself or herself against the assault.[19]

This suggests that, in addition to proving that a non-elderly victim of abuse, neglect, or exploitation suffers from a physical or mental impairment (as defined in G.S. 14-32.3(d)(2) and G.S. 108A-101(d)), the State must prove beyond a reasonable doubt that the physical or mental impairment in some way increased the disabled adult's vulnerability to the alleged abuse, neglect, or exploitation, or rendered the disabled adult incapable of protecting himself or herself from the alleged abuse, neglect, or exploitation.[20]

Who is an "Elder" Adult?

Although the definition of "disabled adult" undoubtedly includes many elderly people,[21] G.S. 14-32.3 also covers a second, distinct category of "elder adults" who may be victims of abuse, neglect, or exploitation by caretakers. The statute defines an "elder adult" as a person sixty years of age or older who is unable to obtain the social, medical, psychiatric, psychological, financial, or legal services necessary (1) to safeguard his or her rights and resources, *and* (2) to maintain his or her physical and mental well-being.[22]

Again, this definition of "elder adult" is based, at least in part, on the definitions contained in North Carolina's adult protective services statute. And like the definition of "disabled adult," the definition of "elder adult" raises a number of questions.

It is clear that if the victim of abuse, neglect, or exploitation is aged sixty or over, G.S. 14-32.3 does not require the State to prove that the victim also was "disabled" or "physically or mentally incapacitated." However, it is not clear exactly what, in addition to the victim's age, the State must prove to establish that a non-disabled, elderly victim is an "elder adult" under the statute.

What does the statutory language regarding an elderly person's inability to provide "essential services" mean in the context of a criminal prosecution involving a caretaker's abuse, neglect, or exploitation of a non-disabled, elderly person?

Presumably, the language regarding an elderly person's inability to provide "essential services" modifies and narrows the class of non-disabled elderly individuals who otherwise would be protected by the criminal statute. No appellate cases or regulations interpret the meaning of "essential services" under the adult protective services statute. Since G.S. 14-32.3 does not require that an "elder adult" be mentally or physically disabled, it is unclear whether an elderly victim's inability to provide for essential services must be related to his or her age, or to some factor other than physical or mental impairment.

Assume, for example, that a non-disabled, mentally competent, sixty-five year old woman is assaulted or exploited by her husband or son. Would the mere fact that she is sixty-five years old be sufficient to prove that she was unable to obtain the services necessary to safeguard her rights and resources and to maintain her physical and mental well-being? If so, why didn't the General Assembly simply define "elder adult" as an individual aged sixty or over?

Again, it may be that the vulnerability of an elderly victim to abuse, neglect, or exploitation because of advanced age is, at least implicitly, an element of criminal abuse, neglect, and exploitation under G.S. 14-32.3.[23]

When Does a Disabled or Elder Adult Reside in a "Domestic" Setting?

In addition to proving that the victim of abuse, neglect, or exploitation meets the statutory definition of a "disabled" or "elder" adult under G.S. 14-32.3, the State also must prove that, at the time of the alleged abuse, neglect, or exploitation, the victim (1) was present in North Carolina, and (2) was "residing in a domestic setting."

Residence in a domestic setting includes residence in any residential setting *other* than (1) a health care facility [i.e., a hospital, nursing home, or other health care facility as defined in G.S. 14-32.2(c)], or (2) a residential care facility [i.e., an adult care home or other residential care facility as defined in G.S. 14-32.2(c)].[24]

Thus, G.S. 14-32.3 applies with respect to the abuse, neglect, or exploitation of an elderly or disabled person who resides in his or her own home or in the home of a relative. A different criminal statute, G.S. 14-32.2, imposes penalties for the abuse or neglect of elderly and disabled patients who reside in nursing homes, adult care homes, or other health care facilities.[25]

The Definition of "Caretaker" Under G.S. 14-32.3

A person who abuses, neglects, or exploits an elderly or disabled person may not be found guilty under G.S. 14-32.3 unless he or she was the victim's "caretaker" at the time the abuse, neglect, or exploitation occurred.

The statute's definition of "caretaker" is important for at least two reasons. First, in cases involving the assault, unreasonable confinement, or exploitation of elderly or disabled adults, the definition of "caretaker" significantly narrows the class of individuals who otherwise might be subject to prosecution for such acts under the new law. Second, because the State generally may not punish a person for failing to perform some act unless the person has a legal responsibility to perform the act or duty in question, the definition is critical in identifying under what circumstances, or as a result of what relationships, a person has a duty to provide medical or hygienic care to an elderly or disabled adult who lives in a domestic setting.[26]

The statute defines "caretaker" as a person who (1) has the responsibility for the care of a disabled or elder adult "as a result of family relationship," *or* (2) has assumed the responsibility for the care of a disabled or elder adult "voluntarily or by contract."[27] Again, however, the law may not be as clear as it seems.

"Caretaker" Status Based on Family Relationships

When does a person have the responsibility for the care of an elderly or disabled adult as the result of a family relationship? Is an individual's familial relationship with the victim, standing alone, sufficient proof of his or her status as the victim's caretaker?

The spouses of elderly or disabled persons, the parents of disabled adults, and the adult children of elderly or disabled persons undoubtedly have a *moral* responsibility to care for and support their spouses, children, and parents. In addition, North Carolina law imposes a *legal* obligation on an adult to provide financial support for his or her parents if (a) the adult's parents are sick or not able to work, and do not have sufficient means to maintain or support themselves, and (b) the adult child has sufficient income to support his or her parents as well as his or her own immediate family.[28] With these exceptions, however, family members generally have no *legal* responsibility for the care of elderly or disabled relatives based solely on family relationship.[29]

It is unclear, therefore, whether an individual's *moral* responsibility to provide care for an elderly or disabled relative, or the individual's legal responsibility to provide *financial* support for an elderly or disabled relative, is sufficient to characterize the individual as a "caretaker." G.S. 14-32.3 may require proof that the individual, in fact, assumed responsibility for the care of the elderly or disabled relative, either voluntarily or under an express or implied contract.

In People v. Heitzman,[30] the California Supreme Court held that a woman could not be held criminally responsible for the death of her elderly father solely because she was the victim's daughter and failed to intervene when she knew that her father was being abused or neglected by her brothers. The defendant's father lived with his two sons, who shared primary responsibility for his care. The victim's daughter (the defendant) did not live with her father and brothers, but visited her father's home on a regular basis. Evidence in the case indicated that Mr. Heitzman died as a result of malnutrition, dehydration, and septic shock from infected sores on his body.

Because the alleged criminal conduct by Ms. Heitzman consisted of her failure to act (i.e., her passively permitting her father to suffer as the result of the abuse or neglect by his sons), the State was required to prove that she was under a *legal duty* to prevent the abuse or neglect of her father. The prosecutor argued that, although the victim was not in the actual care or custody of his daughter, Ms. Heitzman had a legal duty, arising from her status as the victim's daughter, to care for and protect her elderly father, and that she breached this duty by failing to intervene or prevent the abuse or neglect of her father by her brothers.

The California Supreme Court, however, held that, although parents have a common law duty to care for and protect their minor children, there is no corresponding legal duty that requires adult children to care for or protect their aging or dependent parents.[31] The court also rejected the prosecutor's argument that such a duty could (a) be based directly on the statute imposing criminal penalties for the abuse or neglect of elderly or disabled persons, or (b) be derived from laws requiring adult children to provide financial support for elderly or disabled parents who are unable to support themselves.[32]

Other courts, however, have upheld convictions for criminal neglect based on the defendants' breach of their legal responsibilities to care for disabled or elderly family members. For example, in People v. McKelvey,[33] the California Court of Appeals upheld the conviction of a defendant for criminal neglect of his physically disabled (but mentally competent) mother, based on the fact that he lived with his mother and was the only person in the home who could care for her. Similarly, in Davis v. Commonwealth,[34] the Virginia Supreme Court upheld a woman's conviction for involuntary manslaughter based on her failure to provide her elderly, disabled mother with heat, food, water, and necessary medical and hygienic care.

In both *Davis* and *McKelvey*, however, it was not the familial relationship, standing alone, that required

the defendants to care for their elderly or disabled relatives, but rather the fact that they assumed responsibility for the care of their elderly or disabled relatives voluntarily or through contract.

It can be argued, therefore, that because North Carolina law does not impose a *legal* duty to care for or protect an elderly or disabled adult based solely on a family relationship, a defendant may not be convicted of abuse, neglect, or exploitation when the only evidence of his or her status as a "caretaker" is that he or she is related to the victim.[35] If this is so, district attorneys who prosecute cases under G.S. 14-32.3 may need to prove that, regardless of whether a defendant was related to the victim, the defendant actually assumed responsibility, voluntarily or by contract, for the care of a disabled or elderly person.

"Caretaker" Status Based on Voluntary or Contractual Duty of Care

Regardless of whether the defendant is related to the victim by blood or marriage, a defendant may be prosecuted under G.S. 14-32.3 if he or she has assumed responsibility for the care of an elderly or disabled adult voluntarily or by contract.

What does it mean to assume responsibility for the "care" of an elderly or disabled adult? In interpreting the term "caretaker" under North Carolina's adult protective services law, the state Division of Social Services (DSS) suggests that a caretaker is someone who (1) has *comprehensive* responsibility for a disabled adult's day-to-day well-being, (2) is responsible for ensuring that *all* of the adult's needs are met, or (3) is responsible for making decisions on behalf of a disabled adult.[36] DSS, however, does not consider a person to be the "caretaker" of a disabled adult under G.S. 108A-101(b) if the person provides specific, limited services to the disabled adult voluntarily or by contract.

The most obvious example of a caretaker's contractual responsibility for the care of a disabled or elderly adult is where an individual expressly agrees, orally or in writing, to provide comprehensive, continuing care for an elderly or disabled adult in exchange for compensation.

For example, in Commonwealth v. Pestinikas,[37] a Pennsylvania court upheld the third degree murder conviction of a couple who entered into an oral contract to provide food, shelter, and care for a ninety-two year old man. Although the elderly victim paid the defendants $300 per month, he died from exposure, starvation, dehydration, and neglect resulting from the defendants' failure to provide him with adequate shelter, food, or medical care. On appeal, the defendants argued that they could not be convicted for failing to provide adequate food or shelter to the victim because they were under no legal duty to do so. The court, however, rejected this argument based on the existence of an express, oral contract between the defendants and the victim.

Proof of an express contract to provide care to an elderly or disabled adult, however, may not always be sufficient. Even in cases involving an express, written contract, there may be some question as to whether a person meets the definition of "caretaker" if he or she contracts to provide specific, limited services to an elderly or disabled adult rather than assuming comprehensive responsibility for the victim's care. For example, although the term "care" probably includes the provision of food and shelter, it is not clear whether the owner of a rooming house who provides room and board for an elderly or disabled adult under a contractual agreement can be said to have assumed contractual responsibility for the individual's care to such an extent that he or she would be potentially subject to the provisions of G.S. 14-32.3. The same also may be true with respect to in-home aides, home health aides, and staff of adult day care programs who provide care and services to elderly and disabled adults.

Responsibility for the care of an elderly or disabled adult also may be predicated on an implied contract to provide care. In Davis v. Commonwealth,[38] the Virginia Supreme Court upheld a woman's conviction for involuntary manslaughter in connection with the death of her elderly mother. In *Davis*, the defendant (Ms. Davis) contended that the evidence failed to establish that she had a legal duty to care for her mother. The court, however, disagreed.

> The evidence makes clear that Davis accepted sole responsibility for the total care of [her mother]. This became her full-time occupation. In return, [the victim] allowed Davis to live in her home expense free and shared with Davis her income from social security. Additionally, [the victim] authorized Davis to act as her food stamp representative, and for this Davis received food stamp benefits in her own right. From this uncontroverted evidence, the trial court reasonably could find the existence of an *implied contract*. Clearly, Davis was *more than a mere volunteer*; she had a *legal* duty, not merely a *moral* one, to care for her mother.[39]

The existence of an express or implied contract to care for an elderly or disabled adult, however, is not an essential element of the definition of "caretaker." As noted above, the definition of "caretaker" under G.S. 14-32.3 includes persons who *voluntarily* assume responsibility for the care of disabled or elder adults who live in domestic settings. It is not necessary that

the victim live with the defendant or pay the defendant for providing care. Caretakers, therefore, might include individuals who have been appointed as guardians of the person or estate of elderly or disabled adults; persons who exercise comprehensive decision-making authority on behalf of an elderly or disabled adult under a power of attorney; spouses, children, or other relatives who provide care for an elderly or disabled family member; and neighbors, friends, or relatives who provide free, comprehensive care to an elderly or disabled adult.[40]

Prosecuting Criminal Abuse Under G.S. 14-32.3

The caretaker of a disabled or elder adult who resides in a domestic setting is guilty of *abuse* under G.S. 14-32.3(a) if he or she

1. knowingly, willfully, and with malice aforethought
2. abuses the disabled or elder adult by
   (a) assaulting the disabled or elder adult,
   (b) failing to provide medical or hygienic care for the disabled or elder adult, *or*
   (c) confining or restraining the disabled or elder adult in a place or under a condition that is cruel or unsafe; *and*,
3. as a result of such abuse, causes the disabled or elder adult to suffer mental or physical injury.

If the disabled or elder adult suffers serious injury from the abuse, the caretaker is guilty of a Class F felony.[41] If the injury suffered by the disabled or elder adult is not serious, the caretaker is guilty of a Class H felony.[42]

Requirement that Abuse be Knowing, Willful, and Malicious

In order to convict a caretaker of abuse under G.S. 14-32.3, the State must prove beyond a reasonable doubt that the caretaker acted, or failed to act, (1) knowingly, (2) willfully, *and* (3) with malice aforethought.

Under North Carolina law, a person acts (or fails to act) "knowingly" when he or she is aware or conscious of what he or she is doing.[43] Although a defendant's knowledge may be implied from the circumstances surrounding his or her actions, the State must prove that the defendant was actually aware of the nature and consequences of his or her actions. It is not enough to prove that the defendant should have known that his or her restraint of an elderly or disabled adult was cruel or unsafe.[44] Knowledge does not include "willful blindness" of a highly probable fact or deliberate avoidance of knowledge.[45]

A defendant acts "willfully" when the act or omission is committed intentionally and without an honest belief that there is an excuse or justification for the act or omission.[46] An act or omission is not willful, however, if it is done negligently or accidentally, or, in the case of a failure to act, if the defendant does not have the means to perform the act.[47] Therefore, a caretaker would not be guilty of abuse based on his or her failure to provide medical or hygienic care to an elderly or disabled adult if the caretaker was physically or financially unable to provide the care.

In a prosecution under G.S. 14-32.3(a), the State is not required to prove that the caretaker's abuse of a disabled or elder adult was premeditated.[48] However, the State must prove that the caretaker committed the abuse with malice, i.e., with ill will, hatred, spite, or resentment toward the victim.[49] The caretaker's malice, however, may be inferred from the nature and circumstances surrounding his or her act.

Prosecuting Assault Under G.S. 14-32.3

The term "assault" under G.S. 14-32.3(a) apparently includes both (1) "battery," i.e., the actual, unlawful application of force against another person (for example, actually striking a person), and (2) "assault," i.e., an attempt to physically injure another person accompanied by a show of force that is sufficient to place the victim in reasonable fear of immediate physical harm.[50]

Slapping, pushing, kicking, burning, or physically injuring a disabled or elder adult all fall within the statutory definition of abuse if the battery of the victim by the caretaker is knowing, willful, and malicious, and results in mental or physical injury.

If the assault does not involve battery, the State must prove that the caretaker attempted or threatened to physically harm the victim. Although the State does not have to prove that the caretaker intended to actually harm the victim, it must prove that the caretaker's threats or actions placed the victim in fear of physical injury. Thus, a caretaker who intentionally causes mental injury by constantly cursing or yelling at an elderly or disabled adult is not guilty of assault under G.S. 14-32.3, unless the yelling or cursing is accompanied by a show of force or threat of physical injury that places the victim in fear of physical harm.

Abuse Based on Caretaker's Unreasonable Restraint or Confinement of an Elderly or Disabled Adult

Abuse under G.S. 14-32.3 also includes the unlawful confinement or restraint of a disabled or elder adult. "Confinement" under G.S. 14-32.3 probably means

imprisonment within a given area such as a room or house.[51] "Restraint" includes any restriction on an individual's freedom of movement by confinement or other means, such as threats of force or physically tying up the victim with a rope or cord.[52]

The confinement or restraint of the victim need not be for a substantial length of time;[53] however, it must be done knowingly, willfully, and maliciously.[54] The fact that the confinement or restraint must be malicious implies that the confinement or restraint be unjustified and without the victim's consent. Moreover, the State must prove that the caretaker confined or restrained the victim "in a place or under a condition that is cruel or unsafe."

Thus, using a strap or belt to restrain an elderly or disabled adult in a chair might not necessarily constitute abuse under G.S. 14-32.3, especially if the caretaker reasonably believed that the restraint was necessary to protect the victim from falling out of the chair, and the caretaker did not leave the victim restrained and unattended for an unreasonably long period of time.

Abuse Based on Caretaker's Failure to Provide Medical or Hygienic Care

The third form of criminal abuse under G.S. 14-32.3—failure to provide medical or hygienic care—is different from "assault" or "unreasonable restraint or confinement" because it involves an omission or failure to act, rather than an affirmative act on the part of a caretaker. Like assault or unreasonable restraint or confinement, however, a caretaker's failure to provide medical or hygienic care must be knowing, willful, and malicious to constitute "abuse" under G.S. 14-32.3(a).[55] In the context of a failure to act, this means that the State must prove that the caretaker was capable of providing the necessary medical or hygienic care and nonetheless failed to do so as the result of ill will or malice towards the victim.

What constitutes "medical or hygienic care?" Although the statute does not define the term, "medical care" certainly includes treatment for mental or physical illness by a physician or other health care provider, as well as administration of prescription drugs. Thus, a caretaker's failure to take a disabled or elderly adult to the doctor or hospital for necessary medical treatment, or to ensure that a disabled or elderly adult receives and takes prescribed medications would constitute the failure to provide medical care.

The term "hygienic care" is much less clear. Unlike some of the other terms used in G.S. 14-32.3, "hygienic care" is not derived from the adult protective services law. Nor is it a term that has a commonly understood meaning in the General Statutes or the health care professions.

In its broadest sense, "hygienic care" might include any type of care that is conducive to the preservation of health, sanitation, or cleanliness.[56] "Hygienic care" almost certainly includes providing a clean and sanitary environment and care that will maintain the cleanliness and health of an elderly or disabled adult. Thus, a caretaker who knowingly, willfully, and maliciously failed to bathe a disabled or elder adult, or failed to change the dressings on a wound, or allowed the adult to lie in his or her own feces or urine undoubtedly would be guilty of abuse under G.S. 14-32.3(a).

It is much less clear, however, whether a caretaker's failure to provide adequate shelter, food, or hydration constitutes a failure to provide necessary hygienic care. As originally drafted, the legislation that became G.S. 14-32.3 (Senate Bill 127) provided that "abuse" included a caretaker's willful deprivation of *any* services that are necessary to maintain mental and physical health. Thus, the willful failure to provide food, water, or shelter would have constituted abuse under the original version of Senate Bill 127.[57] The committee substitute for Senate Bill 127, however, deleted the broad reference to "any services that are necessary to maintain mental and physical health," and instead defined abuse and neglect in terms of failure to provide "medical or hygienic care."

On its face, the term "medical or hygienic care" appears to be much more limited in scope than the "necessary services" referred to in the original bill, or the "essential services" referred to in the adult protective services law.[58] Thus, the legislative history of G.S. 14-32.3 and the legislature's apparently deliberate choice of language in defining abuse and neglect raise some question as to whether G.S. 14-32.3 may be used to prosecute a caretaker's malicious (or wanton) failure to provide food, water, or shelter to an elderly or disabled adult.[59]

Physical or Mental Injury Caused by Abuse

In order to convict a caretaker of abuse under G.S. 14-32.3, the State must prove that the elderly or disabled victim suffered mental or physical injury as a result of the caretaker's act or failure to act.

Any physical or mental injury to a disabled or elder adult resulting from abuse by a caretaker is sufficient to support a conviction under G.S. 14-32.3(a).[60] The injury need not be a *serious* injury unless the prosecutor is seeking to convict the caretaker of a Class F, rather than Class H, felony. To convict the caretaker of a Class F felony based on *serious* injury to a disabled or elder adult, however,

the State must prove that the abuse caused great pain and suffering or serious mental injury.[61] Whether an injury is serious, is a question of fact to be decided by the jury.[62]

Prosecuting Criminal Neglect Under G.S. 14-32.3

The caretaker of a disabled or elder adult who is residing in a domestic setting is guilty of *neglect* under G.S. 14-32.3(b) if he or she

1. wantonly, recklessly, or with gross carelessness
2. neglects the disabled or elder adult by (a) failing to provide medical or hygienic care for the disabled or elder adult, *or* (b) confining or restraining the disabled or elder adult in a place or under a condition that is cruel or unsafe; *and*,
3. as a result of such neglect, causes the disabled or elder adult to suffer mental or physical injury.

If the disabled or elder adult suffers serious injury from the neglect, the caretaker is guilty of a Class G felony.[63] If the injury is not serious, the caretaker is guilty of a Class I felony.[64]

The Relationship Between Criminal Neglect and Abuse Under G.S. 14-32.3

The definitions of "caretaker," "disabled adult," "elder adult," "domestic setting," "failure to provide medical or hygienic care," and "unreasonable restraint or confinement" discussed above—as well as the problems and issues associated with these definitions—also apply with respect to prosecutions for criminal neglect under G.S. 14-32.3(b).

An assault by a caretaker on a disabled or elder adult must always be prosecuted as abuse, rather than neglect. A caretaker's unreasonable confinement or restraint of a disabled or elder adult, or the caretaker's failure to provide medical or hygienic care, however, may constitute either abuse or neglect, depending on the caretaker's state of mind. If the confinement, restraint, or failure to provide care is knowing, willful, and malicious, the caretaker's act or failure to act is considered to be abuse; if the caretaker's act or failure to act is wanton, reckless, or grossly careless, it is neglect.

Wanton, Reckless, or Grossly Careless Conduct

Under North Carolina law, an act is "wanton" when it is done "with conscious and intentional disregard of and indifference to the rights and safety of others and without care for the consequences."[65] It is not necessary that the defendant intend to harm the victim.[66] In order to convict a defendant for conduct that is criminally negligent, the State must prove that the defendant's conduct was so unreasonable, reckless, or careless that it was indicative of a "thoughtless disregard of consequences or a heedless indifference to the safety and rights of others."[67]

Defending Charges of Abuse or Neglect Under the "Natural Death" Statute

A caretaker is not guilty of abuse or neglect if his or her act or failure to act is in accordance with North Carolina's "Right to Natural Death" statute (G.S. 90-321, 90-322).

This law allows the withholding or discontinuance, upon the direction and under the supervision of an individual's attending physician, of artificial nutrition or hydration, or medical treatment that serves only to postpone artificially a person's death by sustaining, restoring, or supplanting a vital function, when

1. the person has executed a declaration indicating his or her desire for a natural death, and (a) the person's condition is terminal and incurable, *or* (b) the person is in a persistent vegetative state; *or*
2. the person is mentally incapacitated or is comatose and (a) there is no reasonable possibility that he or she will return to a cognitive sapient state; (b) the person's condition is terminal and incurable *or* the person is in a persistent vegetative state; *and* (c) the person's health care agent, guardian of the person, spouse, immediate relatives, or attending physician authorize the withholding of extraordinary means or artificial nutrition and hydration.

The withholding or discontinuance of extraordinary means or artificial nutrition and hydration in accordance with the "natural death" statute is a valid defense in any criminal action against an individual based on conduct in compliance with that law.[68] It seems extremely unlikely, though, that a caretaker's act or failure to act with respect to a disabled or elder adult living in a domestic setting would fall within the statutory definitions of abuse or neglect under G.S. 14-32.3 and, at the same time, be authorized pursuant to the "natural death" statute. To constitute abuse or neglect, the caretaker's act or failure to act must be (1) knowing, willful, and malicious, or (2) wanton, reckless, or grossly careless. It is hard to imagine a situation in which a caretaker's withholding or discontinuance of extraordinary means or artificial nutrition and hydration at the direction and under the

supervision of the adult's attending physician and in compliance with the statutory requirements of the "natural death" statute could be classified as malicious, wanton, or reckless.

Prosecuting Criminal Exploitation Under G.S. 14-32.3

The caretaker of a disabled or elder adult who resides in a domestic setting is guilty of exploitation under G.S. 14-32.3(c) if he or she

1. knowingly and willfully
2. exploits a disabled or elder adult by (a) making a false representation, (b) abusing a position of trust or fiduciary duty, *or* (c) coercing, commanding, or threatening the disabled or elder adult
3. with the intent to permanently deprive the owner of property or money, *and*,
4. as a result of the exploitation, causes the disabled or elder adult to lose possession or control of property or money.

If the value of the money or property lost by a disabled or elder adult as a result of the caretaker's exploitation exceeds $1,000, the caretaker is guilty of a Class H felony.[69] If value of the money or property is $1,000 or less, the caretaker is guilty of a Class 1 misdemeanor.[70]

Like abuse, exploitation of a disabled or elder adult by a caretaker must be "knowing" and "willful."[71] A caretaker charged with exploitation of a disabled or elder adult also must have the specific intent to permanently deprive the owner of property or money.[72] Thus, a caretaker is not guilty of exploitation under G.S. 14-32.3 if his or her intent is merely to deprive the elder or disabled adult of the possession or use of the property or money temporarily, or under circumstances in which the elder or disabled adult is not likely to lose possession or control of the property or money permanently.[73]

G.S. 14-32.3(c) applies to any type of property owned or controlled by a disabled or elder adult, including real property (land) as well as tangible personal property (such as jewelry or automobiles), money, stocks, bonds, and intangible personal property.

In order to convict a caretaker of exploitation, the State must prove that the caretaker caused the disabled or elder adult to lose possession or control of the property or money. The crime of exploitation, therefore, is an offense against the disabled or elder adult's right to possess or control property. Thus, it is not necessary to prove that the disabled or elder adult owned the property, or that the caretaker (or a third party) obtained legal title to the property as a result of exploitation. Nor is it necessary to prove that the caretaker obtained possession of the property from the victim. For example, a caretaker could be found guilty of exploitation if his or her acts caused the victim to transfer title, possession, or control of the property to someone other than the caretaker. A caretaker also could be convicted of attempted exploitation if he or she attempted to obtain title, possession, or control of the victim's property.[74]

Three types of exploitation are punishable under G.S. 14-32.3(c).

Exploitation Based on False Representations

In the first type of exploitation, a caretaker "makes a false representation" that causes a disabled or elder adult to give or lose possession or control of money or property. In order to convict a caretaker of exploitation based on a false representation, the State must prove that the caretaker

1. knowingly and willfully,
2. with the intention of permanently depriving the owner[75] of possession or control of money or property,
3. made a representation (a) that concerned a past fact, an existing fact, or a future event, (b) that was false, and (c) that was intended to deceive the victim or another person, and
4. as a result of the false representation, caused the disabled or elder adult to give or lose possession or control of the money or property.[76]

The representation by the caretaker may be communicated orally, in writing, or by the caretaker's action or conduct. In many instances, the caretaker will make the false representation directly to the disabled or elder adult. For example, a caretaker could be prosecuted for exploitation if a disabled or elder adult gave the caretaker money based upon the caretaker's false representation that he or she would deposit the money in the victim's bank account (or that he or she would use the money to pay the victim's rent or electric bill), and the caretaker, with no intent to deposit the money or pay the bills, instead spent the money for his or her own benefit.

The law, however, also authorizes the prosecution of a caretaker who makes a false representation to someone other than the disabled or elder adult with the intent of obtaining possession or control of the disabled or elder adult's money or property. For example, a caretaker would be guilty of exploitation if he or she told a bank teller that a disabled or elder adult signed a withdrawal slip when, in fact, the caretaker forged the victim's signature and used the withdrawal slip to transfer money from the victim's account to the

caretaker or to another party with the intent to keep the money permanently.

In each case, however, the false representation by the caretaker must be related causally to the victim's loss of property or money. Thus, a caretaker who stole property from a disabled or elder adult and later lied to cover up the theft would not be guilty of criminal exploitation based on false representations.[77]

Exploitation Based on Abuse of Caretaker's Fiduciary Duty or Position of Trust

In the second type of exploitation, a caretaker causes a disabled or elder adult to lose possession or control of money or property as the result of the caretaker's "abuse" of his or her "position of trust or fiduciary duty" to the victim.

The knowing and willful embezzlement, misuse or diversion of a disabled or elder adult's money or property by a caretaker constitutes exploitation under G.S. 14-32.3 if

1. the caretaker held the adult's money or property in his or her fiduciary capacity,
2. the caretaker's use or diversion of the money or property breached his or her fiduciary duty to the disabled or elder adult, or abused his or her position of trust, and
3. the caretaker intended to deprive the adult of the money or property permanently.

G.S. 14-32.3 does not define the terms "position of trust" or "fiduciary duty." This language clearly includes a person who has been appointed as guardian of the person or estate of a disabled or elder adult or who has been designated as an agent or attorney-in-fact under a power of attorney.[78] It also can be argued that any person who has assumed responsibility for the care of a disabled or elder adult occupies, in some sense, a "position of trust" by virtue of his or her status as a "caretaker." Nonetheless, it is unclear whether G.S. 14-32.3(c) may be used to prosecute caretakers who steal or misuse the money or property of disabled or elder adults when the only position of trust they hold is that of a trusted spouse, child, friend, or neighbor.[79] Moreover, the mere fact that an individual holds a "position of trust" or owes a "fiduciary duty" to an elder or disabled adult does not necessarily mean that he or she is the adult's "caretaker."

Exploitation Based on Threat, Command, or Coercion by a Caretaker

The third type of exploitation punishable under G.S. 14-32.3(c) involves threats, commands, or coercion by a caretaker that cause a disabled or elder adult to lose possession or control of money or property. As with the other two types of exploitation, the caretaker's threats, commands, or coercion must be knowing, willful, and with the intent to permanently deprive the owner of possession or control of the money and property.

In order to convict a caretaker of exploitation based on a "threat," the State must prove that the caretaker made a threat that was communicated to the disabled or elder adult, and that the disabled or elder adult lost possession or control of money or property as a result of the threat.[80] In many instances, the caretaker's threat may be to physically injure the disabled or elder adult or another person, or to damage or destroy property owned by the disabled or elder adult or another person. It is not necessary, however, that the threat relate to conduct that is unlawful. For example, a caretaker could be charged with exploitation based on his or her "threat" to put a disabled or elder adult into a nursing home unless the victim signed a deed conveying his or her home to the caretaker.

Prosecuting Adult Abuse, Neglect, and Exploitation Under Other Criminal Statutes

Although G.S. 14-32.3 is the first, state-wide criminal law that specifically penalizes the abuse, neglect, and exploitation by caretakers of disabled or elder adults who live in domestic settings,[81] district attorneys in North Carolina always have been able to use a number of general criminal statutes to prosecute adult abuse and neglect. It would be a mistake, therefore, to focus on G.S. 14-32.3 as the exclusive authority for prosecuting adult abuse, neglect, and exploitation. More importantly, given the questions, limitations, and potential problems concerning the interpretation and application of G.S. 14-32.3, the state's general criminal law often may provide a more effective means for prosecuting certain types of cases involving adult abuse, neglect, and exploitation.

Prosecuting Criminal Abuse and Neglect of Elderly and Disabled Patients in Health Care Facilities Under G.S. 14-32.2

As discussed above, G.S. 14-32.3 applies with respect to abuse, neglect, or exploitation of disabled or elder adults who live in domestic settings. G.S. 14-32.2, on the other hand, imposes criminal penalties with respect to the abuse or neglect of elderly or disabled patients in nursing homes, adult care homes, or other health care facilities.[82]

Under G.S. 14-32.2, it is a felony for
1. any person,
2. intentionally or as the result of a culpably negligent act or omission,
3. to cause serious bodily injury or death
4. through the physical abuse of
5. a patient in a health care facility or a resident of an adult care home.

Violation of G.S. 14-32.2 is punishable as a Class H felony.[83] However, if the abuse is intentional and proximately results in the death of the patient or resident, the defendant is guilty of a Class C felony.[84] If the abuse is the result of culpably negligent conduct that results in death, the defendant is guilty of a Class G felony.[85]

Unlike G.S. 14-32.3, North Carolina's patient abuse and neglect statute does not require proof that the victim was disabled or elderly. Instead, G.S. 14-32.2 protects all patients residing in health care facilities and residents who live in residential care facilities, regardless of their age or disability. The term "residential care facility" includes adult care homes—that is, family care homes, group homes for developmentally disabled adults, and "rest homes" for elderly or disabled adults—licensed under Chapter 131D of the General Statutes. "Health care facility" includes hospitals, skilled nursing facilities and intermediate care facilities (nursing homes), intermediate care facilities for the mentally retarded, psychiatric facilities, rehabilitation facilities, and other public or private health care related facilities.

The class of potential defendants under G.S. 14-32.2 clearly includes the staff and employees of residential care facilities and health care facilities who are responsible for the care of patients or residents. The statute, however, applies more broadly to *any person* who abuses a patient or resident, regardless of whether the defendant is employed by the facility or is responsible for the care of the patient or resident.

"Abuse" under G.S. 14-32.2 includes "any act or omission" that (a) is intentional or culpably negligent, and (b) results in serious bodily injury or death. The intent of the defendant's act or failure to act may be inferred from proof that the defendant was aware that his or her act or failure to act was almost certain to result in serious bodily injury or death.[86] In order to prove culpable negligence, the State must show that the defendant's act or omission was willfully "gross and flagrant, evincing reckless disregard of human life."[87]

The State also must prove that the victim suffered serious bodily injury or death as a result of abuse by the defendant. Because the statute speaks of serious bodily injury, it probably does not include serious mental injury of a patient or resident. In order to prove the element of serious bodily injury, the State probably must prove that the victim suffered a physical injury that caused great pain and suffering.[88]

Abuse clearly includes any intentional physical assault that results in serious bodily injury to or the death of a patient or resident. Abuse also would include the unreasonable confinement or restraint of a patient or resident if the confinement or restraint was intentional or culpably negligent and resulted in serious bodily injury or death.

It is also clear that abuse under G.S. 14-32.2 includes some types of intentional or culpably negligent omissions or failures to act.[89] The most obvious type of omission that might be prosecuted under G.S. 14-32.2 is the intentional or culpably negligent failure of an employee of a nursing home to provide adequate medical or hygienic care for a patient. In order to prosecute a defendant for abuse based on an *omission* or failure to act, however, the State must prove that the defendant had a legal duty to act (i.e., a legal duty to provide care or protection for the victim).[90] In prosecutions involving employees of nursing homes or adult care homes, this element may be satisfied by proving that the defendant, by virtue or his or her ownership of or employment with a nursing home or adult care home, had a contractual responsibility to provide care for the patient or resident.

Prosecuting Neglect of Elderly or Disabled Adults Under Other Criminal Laws

The most serious cases of adult neglect are those in which an elderly or disabled person dies as the result of neglect by a legally responsible caretaker. G.S. 14-32.3, however, is not an appropriate vehicle for prosecuting cases in which a caretaker's failure to care for an elderly or disabled adult living in a domestic setting results in death.

Instead, if the State can prove that (1) a caretaker had a legal responsibility to provide food, shelter, medical attention, or other care to an elderly or disabled adult, and (2) the caretaker's failure to provide such care resulted in the death of the elderly or disabled adult, the caretaker may be prosecuted for murder (if the caretaker acted intentionally and with malice) or involuntary manslaughter (if the victim's death resulted from the caretaker's culpable failure to perform a legal duty or the defendant's reckless or careless conduct evincing a thoughtless disregard for consequences or a heedless indifference to the rights and safety of others).[91]

The main problem in prosecuting a defendant for murder or manslaughter based on the neglect of an elderly or disabled adult, however, is similar to that in

prosecuting a caretaker for adult abuse or neglect under G.S. 14-32.3—the State must prove that the defendant, by virtue of family relationship or contract or otherwise, had a legal duty to care for or protect the victim and failed to perform that duty.[92]

Prosecuting Assault of Elderly and Disabled Adults Under Other Criminal Laws

Caretakers who assaulted disabled adults were subject to criminal prosecution in North Carolina long before the enactment of G.S. 14-32.3.

In 1981, the General Assembly enacted G.S. 14-32.1, which makes it a Class F felony for any person to assault a "handicapped person" if the victim suffers serious injury as a result of the assault.[93] Most of the disabled and elder adults who are protected under G.S. 14-32.3 also fall within the definition of "handicapped person" under G.S. 14-32.1, i.e., a person (regardless of age) who has a physical or mental disability or infirmity that substantially impairs the person's ability to defend himself or herself. Indeed, in many cases, it may be easier for the State to prove that a victim meets this relatively straight-forward definition of "handicapped person," as opposed to the more complex and problematic definition of "disabled adult" in G.S. 14-32.3(d)(2).[94] Moreover, unlike G.S. 14-32.3, G.S. 14-32.1 does not require the State to prove that the defendant was the victim's "caretaker." In a prosecution under G.S. 14-32.1, the relationship between the defendant and the victim is immaterial. The punishment for an assault resulting in serious injury, however, is the same under G.S. 14-32.1 and G.S. 14-32.3(a).

Prosecutors often may find it easier to use G.S. 14-32.1 (assault on a handicapped person), rather than the newer criminal abuse statute (G.S. 14-32.3), to prosecute caretakers for aggravated assaults on disabled or elderly adults living in domestic settings. Indeed, the only apparent advantages of prosecuting a caretaker's assault on a disabled or elder adult under G.S. 14-32.3 appear to be (1) that the punishment for simple assault is greater under G.S. 14-32.3 (a class H felony) than under G.S. 14-32.1 (a class 1 misdemeanor), and (2) that there may be a few cases in which it is easier to prove that an elderly victim meets the definition of "elder adult" under G.S. 14-32.3 than it would be to prove that the victim is a "handicapped person" as defined by G.S. 14-32.1.

Prosecuting Restraint or Confinement of Elderly and Disabled Adults Under Other Criminal Laws

G.S. 14-32.3 is not the only law under which caretakers may be prosecuted for the unreasonable confinement or restraint of disabled or elder adults.

A caretaker may be found guilty of false imprisonment if he or she intentionally and unlawfully restrains a disabled or elder adult without the adult's consent.[95] The punishment for false imprisonment, however, is less severe than for unreasonable confinement or restraint under G.S. 14-32.3(a). A caretaker convicted of criminal abuse under G.S. 14-32.3(a) based on unreasonable restraint or confinement is punished as a Class H felon, or as a Class F felon if the victim suffered serious injury. False imprisonment, on the other hand, is a Class 1 misdemeanor.

Nonetheless, prosecutors may prefer to prosecute some cases involving the restraint or confinement of disabled or elder adults as false imprisonment, rather than abuse or neglect. In false imprisonment cases the State is not required to prove that the victim was a disabled or elder adult, that the defendant was the adult's caretaker, that the defendant acted maliciously,[96] that the confinement or restraint was "in a place or under a condition that [was] cruel or unsafe," or that the victim suffered physical or mental injury as a result of the defendant's acts.

North Carolina's new criminal abuse and neglect statute, on the other hand, may be useful when the punishment for false imprisonment is not sufficiently severe, or when the restraint or confinement of a disabled or elder adult resulted from the caretaker's gross carelessness rather than the intentional use of force, threats of force, or fraud.

Prosecuting Exploitation of Elderly and Disabled Adults Under Other Criminal Laws

Although G.S. 14-32.3(c) is the only generally applicable criminal statute that specifically addresses the exploitation of elderly and disabled adults by their caretakers, caretakers who exploit elderly and disabled adults also may be prosecuted under a number of other criminal laws.

Larceny by Trick and False Pretenses

In some cases, the exploitation of a disabled or elder adult based on false representations may be prosecuted as larceny by trick or false pretenses. To convict a caretaker of larceny by trick, the State must prove that

the defendant (1) took and carried away personal property by tricking the person having possession of the property, (2) intended to permanently deprive the possessor of the property, and (3) knew that he or she was not entitled to possession of the property.[97] Larceny by trick is punishable as a Class H felony if the value of the property exceeds $1,000, or as a Class 1 misdemeanor if the value of the property is $1,000 or less and the case does not involve any of the additional factors listed in G.S. 14-72(b).

A caretaker also could be found guilty of obtaining property by false pretenses if he or she obtained, or attempted to obtain, money or property from an elderly or disabled adult by making a false representation regarding a past or existing fact or future event with the intent to deceive the victim.[98] Obtaining property by false pretenses is punishable as a Class H felony regardless of the value of the property involved.

Again, prosecutors may find that it is easier to prosecute some cases as larceny or false pretenses than as "exploitation" based on a false representation.

As noted above, the punishment for larceny by trick is the same as the punishment for exploitation under G.S. 14-32.3(c). In addition, the elements of exploitation based on false representations and larceny by trick are similar. However, a caretaker who steals a disabled or elder adult's property may be prosecuted for larceny regardless of whether the theft was accomplished by trick or false representations, and in a larceny case the State is not required to prove that the defendant was a "caretaker" or that the victim was a "disabled or elder adult" within the definition of G.S. 14-32.3.

Similarly, the punishment for obtaining property by false pretenses is equal to or greater than the punishment for exploitation under G.S. 14-32.3(c). In a prosecution for obtaining property by false pretenses, however, the State is not required to prove that the defendant was the disabled or elder adult's caretaker, that the victim was a disabled or elder adult, or that the defendant intended to permanently deprive the owner or victim of the money or property.

Embezzlement and Extortion

Other types of cases involving exploitation of disabled or elder adults by caretakers may be prosecuted as embezzlement or extortion.

Under G.S. 14-90, a caretaker may be convicted of embezzlement (a Class H felony) if he or she (1) fraudulently, or knowingly and willfully (2) uses a disabled or elder adult's money or property that the caretaker holds in a fiduciary capacity (3) for a purpose other than that for which the caretaker received the property. Under G.S. 14-32.3(c), a caretaker is guilty of exploitation (a Class H felony) if he or she knowingly, willfully, and with the intent to permanently deprive the owner of money or property, causes a disabled or elder adult to lose possession of money or property by "abusing [the caretaker's] position of trust."

Both offenses are Class H felonies. In both instances, the defendant's breach of a fiduciary duty or abuse of a position of trust is essential. However, exploitation based on abuse of trust is not identical to the crime of embezzlement. In a prosecution for exploitation, the State is not required to prove that the defendant was entrusted with the disabled or elder adult's property. On the other hand, in a prosecution for embezzlement, the State is not required to prove that the defendant was a caretaker, that the victim was a disabled or elder adult, or that the defendant intended to permanently deprive the disabled or elder adult of the money or property. Therefore, if the guardian of the estate of a disabled or elder adult simply "borrowed" $3000 from the victim's bank account for the guardian's personal use, with the intent to return the money, the guardian could not be convicted of exploitation under G.S. 14-32.3, but could be found guilty of embezzlement, even if he or she repaid the money to the victim's account.

Similarly, a caretaker who exploits a disabled or elder adult by coercion, threats, or commands may be guilty of extortion. Extortion is a Class F felony regardless of the amount of money or the value of the property involved. Exploitation, on the other hand, is a Class H felony or a Class 1 misdemeanor, depending on the value of the money or property involved.

In order to convict a caretaker of exploitation under G.S. 14-32.3(c)(iii), the State must prove that the defendant, knowingly, willfully, and with the intent to permanently deprive the owner of property, caused the disabled or elder adult to lose possession of money or property as the result of coercion, threats, or commands. In order to convict a caretaker of extortion, the State must prove that the defendant threatened the disabled adult or another person, with the intent to wrongfully obtain money, property, or any thing of value.[99] In a prosecution for extortion, however, the State is not required to prove that the defendant was the victim's caretaker, that the victim was a disabled or elder adult, or that the victim lost possession of money or property as a result of the threat by the defendant.

Cooperation Between Social Services and Law Enforcement Agencies in Adult Abuse and Neglect Cases

As noted above, both the criminal justice system and social services agencies are responsible for responding to incidents involving adult abuse and neglect.

The criminal justice system—law enforcement agencies, district attorneys, and criminal courts—focuses primarily on the perpetrator. The criminal process involves investigating complaints involving criminal conduct directed against elderly or disabled victims, arresting and prosecuting persons who abuse, neglect, or exploit elderly or disabled victims, adjudicating the guilt or innocence of defendants, and punishing those who are found guilty.

The focus of the social services system, by contrast, is directed more toward the victim of abuse, neglect, or exploitation. Almost half of all the adult abuse and neglect cases reported to county departments of social services under North Carolina's adult protective services (APS) law (and more than half of all "confirmed" APS cases) involve "self neglect," i.e., a disabled adult's inability to care for himself or herself, rather than a caretaker's abuse, neglect, or exploitation of a disabled adult. Even in cases involving abuse or neglect by a caretaker, the "protective services" that social services agencies provide under the APS law are, for the most part, services provided to or on behalf of the victim, rather than civil or criminal sanctions directed against the caretaker or perpetrator.

Although the criminal justice system and social services agencies operate under different laws and respond to adult abuse and neglect in different ways, they cannot operate in isolation from each other. The ability of law enforcement agencies and district attorneys to prosecute adult abuse, neglect, and exploitation often depends on the cooperation and assistance of social services agencies. Conversely, social services agencies sometimes need assistance from law enforcement agencies in investigating adult abuse and neglect, and there are times when the only way to protect an elderly or disabled victim is to remove and criminally punish the victim's caretaker.

North Carolina's adult protective services law addresses the relationship between social services and law enforcement agencies in adult abuse and neglect cases. Under the APS statute, any person—including a law enforcement officer, district attorney, medical provider, or employee of a social services agency—who has reasonable cause to believe that a disabled adult has been abused, neglect, or exploited, and is in need of protective services, must report the matter to the county department of social services (DSS).[100] The law also requires public agencies—including law enforcement agencies, public health departments, mental health agencies, and hospitals—to "cooperate fully" with DSS in its investigation of reports concerning suspected abuse, neglect, or exploitation of disabled adults.[101] On the other hand, if DSS finds evidence that a person has abused, neglected, or exploited a disabled adult, the APS law requires DSS to report the matter to the district attorney.[102]

The law, however, does not necessarily guarantee that social services and law enforcement agencies will cooperate with each other in cases involving adult abuse and neglect. At least part of the impetus underlying the enactment of G.S. 14-32.3 was the perception by many social services agencies that district attorneys were not prosecuting adult abuse and neglect cases after receiving reports from DSS confirming abuse, neglect, or exploitation. On the other hand, law enforcement agencies sometimes are frustrated in their attempts to obtain evidence of abuse or neglect from social services agencies because of the legal restrictions regarding confidentiality of social services, mental health, and medical records.

Problems resulting from the lack of collaboration between social services and law enforcement agencies are not unique to North Carolina. The National Aging Resource Center on Elder Abuse (NARCEA) found that the lack of good working relationships between social services and law enforcement agencies in many parts of the country was not due to the unwillingness of either agency to work and cooperate with the other, but rather could be attributed to lack of familiarity with the other agency's role in adult abuse cases, lack of time and resources to develop formal relationships between the agencies, and differences in the professional culture of the agencies.[103]

NARCEA also found, however, that social services and law enforcement agencies in some cities and states have established cooperative agreements and joint investigation protocols for adult abuse and neglect cases.[104] In addition, a number of law enforcement and criminal justice agencies across the United States have established special units to investigate and prosecute adult abuse and neglect.[105]

In North Carolina, the state Division of Social Services has provided training regarding the roles of social services and law enforcement agencies under the APS statute for law enforcement officers at the North Carolina Criminal Justice Academy in Salemburg. The state Division of Social Services also has provided training for county social services employees with respect to North Carolina's new criminal abuse

and neglect statute. Both social services agencies and law enforcement agencies in North Carolina could benefit, however, from joint training programs and the development of local plans and protocols regarding adult abuse and neglect.

Conclusion

Although some people have argued that "criminal remedies are largely ineffective [in] solving the elder abuse problem,"[106] there are clearly cases in which criminal sanctions are an entirely appropriate response to the abuse, neglect, or exploitation of disabled and elderly adults by caretakers. Indeed, in many cases, criminal prosecution of a caretaker for abuse, neglect, or exploitation of an elderly or disabled adult may be a more appropriate and effective remedy than the provision of "protective services" under North Carolina's APS statute.

In enacting G.S. 14-32.3, the General Assembly intended to expand the State's protection of elderly and disabled adults by establishing new or increased criminal penalties for caretakers who abuse, neglect, or exploit elderly or disabled adults living in domestic settings. Unfortunately, however, the General Assembly's obvious concern for elderly and disabled citizens may be frustrated by the statute's lack of clarity in defining who is protected, who may be punished, and what actions or failures to act are punishable under the new law.[107]

The questions and problems regarding the meaning of terms such as "disabled adult," "elder adult," "caretaker," and "failure to provide medical and hygienic care" discussed in this bulletin may make district attorneys reluctant to prosecute caretakers under G.S. 14-32.3, or make it difficult for prosecutors to obtain convictions under this statute. If this is so, the law will have little or no effect in preventing or punishing adult abuse and neglect.[108]

It also can be argued that much of the abuse, neglect, and exploitation of disabled or elder adults that G.S. 14-32.3 seeks to punish is, and has been, punishable under other criminal statutes. If so, a dearth of criminal prosecutions for adult abuse and neglect may be due to a lack of understanding or an unwillingness to use existing criminal sanctions in cases involving adult abuse and neglect, rather than the lack of legal authority to prosecute adult abuse and neglect.

There are no easy solutions to the problem of adult abuse and neglect. There is, however, much that government, the criminal justice system, social services agencies, local communities, and families, working together, can and should do to prevent or remedy the abuse and neglect of elderly and disabled adults.

Appendix

N.C. Gen. Stat. § 14-32.3.

Domestic abuse, neglect, and exploitation of disabled or elder adults.

(a) Abuse. A person is guilty of abuse if that person is a caretaker of a disabled or elder adult who is residing in a domestic setting and, with malice aforethought, knowingly and willfully (i) assaults, (ii) fails to provide medical or hygienic care, or (iii) confines or restrains the disabled or elder adult in a place or under a condition that is cruel or unsafe, and as a result of the act or failure to act the disabled or elder adult suffers mental or physical injury.

If the disabled or elder adult suffers serious injury from the abuse, the caretaker is guilty of a Class F felony. If the disabled or elder adult suffers injury from the abuse, the caretaker is guilty of a Class H felony.

A person is not guilty of an offense under this subsection if the act or failure to act is in accordance with G.S. 90-321 or G.S. 90-322.

(b) Neglect. A person is guilty of neglect if that person is a caretaker of a disabled or elder adult who is residing in a domestic setting and, wantonly, recklessly, or with gross carelessness (i) fails to provide medical or hygienic care, or (ii) confines or restrains the disabled or elder adult in a place or under a condition that is unsafe, and as a result of the act or failure to act the disabled or elder adult suffers mental or physical injury.

If the disabled or elder adult suffers serious injury from the neglect, the caretaker is guilty of a Class G felony. If the disabled or elder adult suffers injury from the neglect, the caretaker is guilty of a Class I felony.

A person is not guilty of an offense under this subsection if the act or failure to act is in accordance with G.S. 90-321 or G.S. 90-322.

(c) Exploitation. A person is guilty of exploitation if that person is a caretaker of a disabled or elder adult who is residing in a domestic setting, and knowingly, willfully and with the intent to permanently deprive the owner of property or money (i) makes a false representation, (ii) abuses a position of trust or fiduciary duty, or (iii) coerces, commands, or threatens, and, as a result of the act, the disabled or elder adult gives or loses possession or control of property or money.

If the loss of property or money is of a value of more than one thousand dollars ($1,000) the caretaker is guilty of a Class H felony. If the loss of property or money is of a value of less than one thousand dollars ($1,000) the caretaker is guilty of a Class 1 misdemeanor.

(d) Definitions. The following definitions apply in this section:

(1) Caretaker. A person who has the responsibility for the care of a disabled or elder adult as a result of family relationship or who has assumed the responsibility for the care of a disabled or elder adult voluntarily or by contract.

(2) Disabled adult. A person 18 years of age or older or a lawfully emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated as defined in G.S. 108A-101(d).

(3) Domestic setting. Residence in any residential setting except for a health care facility or residential care facility as these terms are defined in G.S. 14-32.2.

(4) Elder adult. A person 60 years of age or older who is not able to provide for the social, medical, psychiatric, psychological, financial, or legal services necessary to safeguard the person's rights and resources and to maintain the person's physical and mental well-being.

[1995 N.C. Sess. Laws ch. 246, applicable to offenses committed on or after December 1, 1995.]

Notes

* Mr. Saxon is an associate professor of public law and government on the faculty of the Institute of Government. His areas of responsibility include laws and programs for senior citizens, social services law, and child support.

1. Unless otherwise noted, in this bulletin the term "adult abuse and neglect" refers to the abuse, neglect, or exploitation of elderly or disabled adults by their spouses, adult children, relatives, neighbors, or other persons who care for them in residential, rather than institutional, settings, and does not include cases involving self neglect resulting from an elderly or disabled adult's inability to care for himself or herself. There is no uniform or commonly-accepted definition of adult abuse or neglect. In fact, one finds a wide variety of definitions of adult abuse and neglect in the laws of different states and in research studies investigating the prevalence of adult abuse and neglect. *See* Tanya Johnson, "Critical Issues in the Definition of Elder Mistreatment," in Karl A. Pillemer and Rosalie S. Wolf, eds., *Elder Abuse: Conflict in the Family* (Dover, Massachusetts: Auburn House, 1986), 170–71; Toshio Tatara, *Elder Abuse in the United States: An Issue Paper* (Washington, D.C.: National Aging Resource Center on Elder Abuse, 1990), 3–19. The lack of a uniform definition of adult abuse and neglect makes it difficult to compare the results of these studies or to compile meaningful data regarding the prevalence of adult abuse and neglect in the United States.

2. *See* Tatara, *Elder Abuse in the United States*; Toshio Tatara, *Summaries of the Statistical Data on Elder Abuse in Domestic Settings for FY 90 and FY 91* (Washington, D.C.: National Aging Research Center on Elder Abuse, 1993).

3. *Adult Protective Services Report, SFY 1994–95* (Raleigh, N.C.: Division of Social Services, 1996), 10. The state Division of Social Services does not compile separate statistics regarding the number of confirmed cases in which caretakers abused or neglected elderly or disabled adults who live in domestic settings. The number in the text is an estimate based on available data regarding the total number of confirmed cases of abuse, neglect, and exploitation, with adjustments based on the number of confirmed cases involving "self neglect" and the number of reported cases involving abuse, neglect, or exploitation of disabled adults living in facilities.

4. Karl Pillemer and David Finkelhor, "The Prevalence of Elder Abuse: A Random Sample Survey," *The Gerontologist* 28(1988):51–57.

5. The estimate in the text was computed by multiplying the estimated number of confirmed cases in which caretakers abused or neglected disabled adults living in domestic settings (700 cases) by fourteen. The National Aging Resource Center on Elder Abuse estimates that approximately 735,000 older Americans were abused, neglected, or exploited by caretakers in domestic settings during the period October, 1990, through September, 1991. Tatara, *Statistical Data on Elder Abuse*, 29. NARCEA's estimate excludes cases involving "self neglect" of elderly adults, cases involving abuse, neglect, or exploitation of elderly adults who live in nursing homes or other institutions, and cases involving abuse, neglect, or exploitation of non-elderly disabled adults.

6. Tatara, *Elder Abuse in the United States*, 7–8, 10–12. In 1974, North Carolina became one of the first states to enact an APS statute. North Carolina's APS statute is codified as N.C.GEN.STAT. § 108A-99 through 108A-111. In North Carolina, county departments of social services are responsible for receiving and investigating reports regarding the abuse, neglect, or exploitation of disabled adults, and for providing or arranging for services for disabled adults who need protection.

7. As noted above, the definitions of abuse, neglect, and exploitation under APS statutes vary from state to state. Unlike the APS laws of most other states, North Carolina's

APS law defines neglect to include the "self neglect" of an elderly or disabled adult. N.C. Gen. Stat. § 108A-101(m). *See also* Tatara, *Elder Abuse in the United States*, 8.

8. In North Carolina and most other states, the APS law applies to all disabled adults over the age of eighteen, and not exclusively to elderly persons. *See* N.C. Gen. Stat. § 108A-101(d). Approximately seventeen states, however, have enacted adult abuse and neglect legislation under which protective services are provided only to "elderly" persons who have been abused or neglected. Tatara, *Elder Abuse in the United States*, 7–8.

9. Reporting of adult abuse and neglect is mandatory in North Carolina and most other states. Tatara, *Elder Abuse in the United States*, 73–74. In North Carolina, the mandatory reporting requirement applies to "any person who has reasonable cause to believe that a disabled adult is in need of protective services." N.C. Gen. Stat. § 108A-102(a). By contrast, the mandatory reporting requirements of APS laws in most other states apply only to health care providers, designated professionals, or other specified categories of individuals. Tatara, *Elder Abuse in the United States*, 75–76. In a handful of states, reporting of adult abuse and neglect is completely voluntary. Tatara, *Elder Abuse in the United States*, 73–74.

10. The five protective services most frequently identified by social workers in substantiated APS cases in North Carolina (including cases involving self neglect) are: (1) placement in a nursing home, adult care home, or other setting; (2) in-home aide services; (3) medical care; (4) counseling; and (5) mental health services. *Adult Protective Services Report*, 12–13.

11. In North Carolina, county departments of social services also are required to notify the district attorney when there is evidence indicating that a person has abused, neglected, or exploited a disabled adult. N.C. Gen. Stat. § 108A-109.

12. David P. Matthews, "The Not-So-Golden Years: The Legal Response to Elder Abuse," 15 PEPPERDINE L. REV. 653, 657–58 (1988).

13. The text of G.S. 14-32.3 is included as an Appendix to this bulletin. References to the North Carolina General Statutes are cited hereafter as G.S.

14. 1995 N.C. Sess. Laws ch. 246. The commission's 1995 report stated that the "criminal statutes of North Carolina do not address the prosecution of a perpetrator of abuse or neglect when the elderly or disabled victim is living in a domestic setting." North Carolina Study Commission on Aging, "Report to the Governor and the 1995 General Assembly of North Carolina," p. H-4.

15. G.S. 14-32.3 applies to offenses committed on or after December 1, 1995.

16. G.S. 14-32.3(d)(2).

17. Incapacity often is defined in reference to an individual's partial or total inability to perform a specific function or task. For example, "incapacity" under North Carolina's workers' compensation law means an employee's inability, as the result of an employment-related injury, to earn from the same or any other employment the wages that the employee was receiving at the time of the injury. *See* G.S. 97-2(9). Statutes regarding the removal of public officers or the termination of career teachers based on "incapacity" generally refer to the officer's or teacher's inability to perform the functions of his or her office or employment. *See* G.S. 115C-325(e)(1)(e); 147-12(3)(a). *See also* G.S. 35A-1370(8) (defining incapacity under North Carolina's "standby guardianship" law as a parent's chronic and substantial inability, as a result of mental or organic impairment, to understand the nature and consequences of decisions concerning the care of his or her minor child); G.S. 7A-517(13) (defining a dependent child as a child whose parent is unable to provide appropriate care or supervision of the child due to the parent's physical or mental incapacity).

18. *See* G.S. 108A-101(e), 108A-101(i). Data from the state Division of Social Services indicate that over three-quarters of all APS cases involve individuals who suffer from physical illness or impairments, Alzheimer's or related cognitive impairments, or multiple disabilities. *Adult Protective Services Report*, 5. There has been only one reported, appellate case decided under North Carolina's adult protective services statute. In re Lowery, 65 N.C. App. 320, 309 S.E.2d 469 (1983). In the *Lowery* case, the trial court held that a twenty-one year old, mentally retarded woman with an IQ of less than 43 was a "disabled adult" within the meaning of G.S. 108A-101, but had not been abused or neglected by her parents. The court of appeals reversed the trial court based on the trial judge's failure to make sufficient findings of fact in support of his conclusion that the woman had not been abused or neglected. The appellate court, however, did not address the trial court's finding that the victim was a "disabled adult" within the meaning of the APS statute.

19. In addition, a number of appellate cases decided under North Carolina's criminal sentencing statutes hold that a judge may not increase the sentence of a criminal defendant based on the physical or mental incapacity of the victim unless the victim's physical or mental incapacity rendered the victim more vulnerable to the criminal act. *See* State v. Handy, 331 N.C. 515, 419 S.E.2d 545 (1992). Under the Fair Sentencing Act (G.S. 15A-1340.4(a)(1)(j), repealed effective October 1, 1994), the fact that a victim was "very old, or mentally or physically infirm" could be considered by the court as an aggravating factor in imposing a criminal sentence against the defendant. North Carolina's current criminal sentencing statute (the Structured

Sentencing Act) contains a similar, but slightly more expansive, provision allowing a judge to increase the presumptive sentence of a criminal defendant if the victim is "very old, or mentally or physically infirm, or handicapped." G.S. 15A-1340.16(d)(11).

20. *Cf.* People v. McKelvey, 281 Cal.Rptr. 359 (Cal.App. 1991). In *McKelvey*, the defendant argued that, although his mother suffered from multiple sclerosis and was paralyzed, she was not disabled because she was mentally competent and could have requested assistance from someone outside her home. The California Court of Appeals rejected this contention and upheld the defendant's conviction for criminal neglect of a disabled adult.

21. Many elderly adults experience few health problems. Increased age, however, increases the probability that an individual will experience one or more chronic illnesses or injuries that significantly limit his or her functional ability. For example, approximately two of every five adults aged eighty-five or older experience a health problem that limits their daily activities. Cynthia Tauber, *Sixty-Five Plus in America* [Current Population Reports, Special Studies, P23-178] (Washington, D.C.: U.S. Bureau of the Census, 1992), 3-11. A significant minority of older adults also suffer from cognitive impairments, depression, alcohol abuse, or other mental illnesses. *North Carolina Aging Services Plan* (Raleigh, N.C.: N.C. Division of Aging, 1991), Vol. 2, 107–08. Thus, it should not be surprising to find that approximately three-fourths of all the reports regarding abuse, neglect, or exploitation of "disabled adults" under North Carolina's APS statute involve individuals who are over the age of sixty. *Adult Protective Services Report*, 3.

22. G.S. 14-32.3(d)(4).

23. *See* State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989) (holding that a victim's advanced age may be considered as an aggravating factor under the Fair Sentencing Act if, separate and apart from evidence of the victim's physical infirmity, the victim's age rendered her relatively defenseless against a robber looking for an unprotected target); *cf.* State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989) (holding that the age of a ninety-two year old burglary victim could not be considered as an aggravating factor under the Fair Sentencing Act when there was no evidence that the defendant burglarized her house because of her advanced age, or that the victim's advanced age made her more vulnerable to burglary).

24. Over 80 percent of all the reports under North Carolina's APS statute during SFY 1994–95 involved disabled adults living in domestic or non-facility settings. *Adult Protective Services Report*, 6.

25. G.S. 14-32.2 is discussed in the text accompanying notes 82 through 89.

26. Stephen Crystal, "Elder Abuse: The Latest 'Crisis'," *The Public Interest* 88(Summer 1987):56, 62. According to Crystal, the criminal adult abuse and neglect laws of some states simply ignore this issue. Both Georgia and Montana make it a crime for "any person" to neglect an elderly or disabled adult. Other states—such as Kentucky and Utah—impose criminal penalties for neglect by a "caretaker" but do not define the class of caretakers who have a duty to care for elderly or disabled adults. Crystal notes that because there are few criminal prosecutions for adult abuse and neglect, the "dubious constitutionality" of these statutes has rarely been tested.

27. G.S. 14-32.3(d)(1). This definition is identical to the definition of "caretaker" contained in North Carolina's adult protective services law. *See* G.S. 108A-101(b). In the 306 cases of abuse, neglect, or exploitation of disabled adults (excluding cases involving self neglect or abuse, neglect, or exploitation by facility staff) substantiated by county departments of social services during SFY 1994–95, an adult child of the victim was the perpetrator in half of the cases, the victim's spouse was the perpetrator in approximately one-third of the cases, and another relative was the perpetrator in the remaining seventeen percent of the cases. *Adult Protective Services Report*, 11–12.

28. G.S. 14-326.1. *See also* G.S. 14-322(c) (requiring a husband or wife to support his or her dependent spouse while they are living together). In 1979, the General Assembly repealed a statute requiring the parents of a disabled child to continue supporting the child beyond the age of majority. *See* G.S. 50-13.8 (repealed in part by section 29, 1979 Sess. Laws ch. 838. These laws, however, require only that a person provide financial support for a spouse, parent, or adult child; they do not impose a legal responsibility to provide *care* for an elderly or disabled relative.

29. Crystal, "Elder Abuse," *The Public Interest* 88(Summer 1987): 56, 62. By contrast, parents have a legal duty to protect their minor children from harm and may be criminally prosecuted if they fail to do so. *See* State v. Mason, 18 N.C. App. 433, 197 S.E.2d 79 (1973) (upholding involuntary manslaughter convictions of parents who failed to provide adequate food, shelter, and medical care for their minor child); State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982) (upholding conviction of parent for aiding and abetting assault on her child based on the parent's failure to take all steps reasonably possible to protect her child from assault by another person); State v. Ainsworth, 109 N.C. App. 136, 426 S.E.2d 410 (1993) (upholding conviction of mother for aiding and abetting rape of her twelve-year-old son based on her failure to take any reasonable steps to prevent sexual intercourse between the child and an adult woman in her presence); G.S. 14-318.4 (imposing criminal penalties on a parent who allows the abuse of his or her minor child).

30. People v. Heitzman, 886 P.2d 1229 (Cal. 1994).

31. People v. Heitzman, 886 P.2d at 1243.

32. People v. Heitzman, 886 P.2d at 1242–43.

33. People v. McKelvey, 281 Cal.Rptr. 359, 362 (Cal.App. 1991). *See also* People v. Manis, 12 Cal.Rptr.2d 619 (Cal.App. 1992) (upholding defendant's conviction for criminal neglect of her elderly mother who lived with her).

34. Davis v. Commonwealth, 335 S.E.2d 375 (Va. 1985).

35. Limiting the application of G.S. 14-32.3(d)(1) to "actual" caretakers may avoid problems that could arise if the statute were construed to apply to the neglect of an elderly or disabled parent by an adult child who lives in another city or state. *Cf.* People v. Superior Court (Holvey), 252 Cal.Rptr. 335, 340–41 (Cal.App. 1988) (holding that the potential over-inclusiveness of California's criminal abuse and neglect law was mitigated by the fact that the State must prove malice, willfulness, or criminal negligence on the part of a person accused of abuse or neglect).

36. N.C. Division of Social Services, *Family Services Manual*, Vol. V, Chapter VII (Protective Services for Adults), section 6510, p. 4.

37. Commonwealth v. Pestinikas, 617 A.2d 1339 (Pa.Super. 1992).

38. Davis v. Commonwealth, 335 S.E.2d 375 (Va. 1985).

39. Davis v. Commonwealth, 335 S.E.2d at 378 (emphasis added).

40. *See* People v. McKelvey, 281 Cal.Rptr. 359 (Cal.App. 1991); People v. Manis, 12 Cal.Rptr.2d 619 (Cal.App. 1992). A caretaker who lives outside of North Carolina, but provides comprehensive care to—or, in the more likely situation, makes decisions on behalf of—an elderly or disabled adult who lives in North Carolina, is subject to prosecution under G.S. 14-32.3 if any part of the alleged abuse, neglect, or exploitation occurred within North Carolina. *See* G.S. 15A-134; State v. First Resort Properties, 81 N.C. App. 499, 344 S.E.2d 354 (1986).

41. The presumptive minimum sentence for a Class F felony ranges from thirteen to thirty-nine months depending on the defendant's prior record.

42. The presumptive minimum sentence for a Class H felony ranges from five to twenty months depending on the defendant's prior record.

43. *See* Thomas H. Thornburg, *North Carolina Crimes: A Guidebook on the Elements of Crime*, 4th ed. (Chapel Hill: Institute of Government, The University of North Carolina at Chapel Hill, 1995), 3.

44. *See* Thornburg, *North Carolina Crimes*, 3.

45. *See* Thornburg, *North Carolina Crimes*, 3.

46. *See* Thornburg, *North Carolina Crimes*, 3–4.

47. *See* Thornburg, *North Carolina Crimes*, 4.

48. *See* Thornburg, *North Carolina Crimes*, 4.

49. *See* Thornburg, *North Carolina Crimes*, 4.

50. *See* Thornburg, *North Carolina Crimes*, 76.

51. *See* Thornburg, *North Carolina Crimes*, 148.

52. *See* Thornburg, *North Carolina Crimes*, 148.

53. *See* Thornburg, *North Carolina Crimes*, 148.

54. If a caretaker's confinement or restraint of an elderly or disabled adult is wanton, reckless, or grossly careless, rather than knowing, willful, and malicious, the caretaker is not guilty of abuse but may be prosecuted for criminal neglect under G.S. 14-32.3(b). See text accompanying notes 63 through 67.

55. See text accompanying notes 43 through 49. If a caretaker's failure to provide medical or hygienic care is wanton, reckless, or grossly careless, rather than willful, knowing, and malicious, the caretaker may be guilty of criminal neglect under G.S. 14-32.3(b).

56. *Webster's College Dictionary* (New York: Random House, 1991), 660.

57. *See also* Senate Bill 937 (1995 Regular Session). This bill, which was not enacted, defined "abuse or neglect" as the willful deprivation of "essential services" such as food, clothing, and shelter.

58. G.S. 108A-101(i) defines "essential services" as any "social, medical, psychiatric, psychological or legal services necessary to safeguard [a] disabled adult's rights and resources and to maintain the physical or mental well-being of the individual . . . [such as] provision of medical care for physical and mental health needs, assistance in personal hygiene, food, clothing, adequately heated and ventilated shelter, protection from health and safety hazards, protection from physical mistreatment, and protection from exploitation."

59. It is possible, of course, that a caretaker's malicious (or wanton) failure to provide food, water, or shelter to an elderly or disabled adult could be prosecuted under a criminal statute other than G.S. 14-32.3. See text accompanying notes 91 through 92.

60. *See* Thornburg, *North Carolina Crimes*, 95 (discussing the element of physical injury under G.S. 14-318.2 [misdemeanor child abuse]).

61. *See* Thornburg, *North Carolina Crimes*, 78. In prosecuting cases under G.S. 14-32.3, prosecutors may rely on case law interpreting the requirement of "serious injury" in connection with G.S. 14-33(c)(1) (assault inflicting serious injury); G.S. 14-32(b) (assault with deadly weapon inflicting serious injury); G.S. 14-32(a) (assault with deadly weapon with intent to kill inflicting serious injury); G.S. 14-32.1(e) (aggravated assault on handicapped person); G.S. 14-318.4 (felony child abuse); or similar statutes.

62. *See* Thornburg, *North Carolina Crimes*, 78.

63. The presumptive minimum sentence for a Class G felony ranges from ten to twenty-nine months depending on the defendant's prior record.

64. The presumptive minimum sentence for a Class I felony ranges from four to ten months depending on the defendant's prior record.

65. *See* Thornburg, *North Carolina Crimes*, 4.

66. *See* Thornburg, *North Carolina Crimes*, 4.

67. *See* Thornburg, *North Carolina Crimes*, 4.

68. G.S. 90-321(h); G.S. 90-322(d).

69. The presumptive minimum sentence for a Class H felony ranges from five to twenty months depending on the defendant's prior record.

70. The presumptive minimum sentence for a Class 1 misdemeanor ranges from one to 120 days depending on the defendant's prior record.

71. See text accompanying notes 43 through 49. A caretaker would not be guilty of "knowingly" exploiting an elder or disabled adult if the caretaker obtained property or money from a disabled adult in the honest, but mistaken, belief that the caretaker was legally entitled to the money or property. *See* Thornburg, *North Carolina Crimes*, 159.

72. G.S. 14-32.3(c) is inapplicable if the caretaker is the legal owner of the property or money. However, a caretaker may be prosecuted for exploiting an elder or disabled adult if the caretaker's exploitation causes the elder or disabled adult to lose control or possession of property or money that is owned by someone other than caretaker or the elder or disabled adult.

73. *See* Thornburg, *North Carolina Crimes*, 159.

74. G.S. 14-2.5. Attempted exploitation is punishable as a Class I felony if the value of the property exceeds $1,000, or as a Class 2 misdemeanor if the value of the property is $1,000 or less.

75. Although the State must prove that the caretaker intended to deprive the owner of possession or control of the property and that the caretaker's false representation caused the disabled or elder adult to lose possession or control of the property, the owner of the property may be someone other than the disabled or elder adult. That is, the property that is the subject of exploitation must be in the possession or control of a disabled or elder adult but may be owned by someone other than the elder or disabled adult.

76. The elements of the crime of exploitation by false representation are similar, but not identical, to the elements of larceny by trick (G.S. 14-72) and obtaining property by false pretenses (G.S. 14-100). *See* Thornburg, *North Carolina Crimes*, 158, 229–32.

77. The caretaker in this example, however, might be guilty of larceny under G.S. 14-72. See text accompanying notes 97 through 99 for discussion of general criminal statutes that may be used to prosecute financial exploitation or property crimes against elderly or disabled adults.

78. *See* Thornburg, *North Carolina Crimes*, 184 (discussing embezzlement).

79. Although G.S. 14-32.3(c) does not expressly require that the caretaker be entrusted with the money or property, this element may be inferred from the requirement that the disabled or elder adult lose possession or control of money or property as the result of the caretaker's abuse of his or her fiduciary duty. If this is so, the mere theft of property by an employee of a disabled or elder adult would not constitute criminal exploitation under G.S. 14-32.3(c). A caretaker's theft or misuse of money or property of a disabled or elder adult, however, might be punishable under other provisions of G.S. 14-32.3(c) or under other criminal statutes punishing larceny, fraud, and similar offenses. See text accompanying notes 97 through 99.

80. It is unclear whether or how the terms "coercion" or "command" differ from "threat" under G.S. 14-32.3(c).

81. In 1983, the General Assembly enacted a statute providing that a caretaker who abused, neglected, or exploited a disabled adult is guilty of a misdemeanor. 1983 N.C. Sess. Laws ch. 901. This statute, however, applies only in Haywood County.

82. G.S. 14-32.2 was enacted by the General Assembly in 1987, and applies to offenses committed on or after October 1, 1987. Criminal process for a violation of G.S. 14-32.2 may be issued only upon the request of a district attorney. G.S. 14-32.2(g).

83. The presumptive minimum sentence for a Class H felony ranges from five to twenty months depending on the defendant's prior record.

84. The presumptive minimum sentence for a Class C felony ranges from fifty-eight months to fourteen years depending on the defendant's prior record.

85. The presumptive minimum sentence for a Class G felony ranges from ten to twenty-nine months depending on the defendant's prior record.

86. *See* Thornburg, *North Carolina Crimes*, 3.

87. G.S. 14-32.2(e).

88. *See* Thornburg, *North Carolina Crimes*, 78.

89. The withdrawal or discontinuance of "extraordinary means" or artificial nutrition or hydration in accordance with the "natural death" statute (G.S. 90-321, 90-322) does not constitute abuse under G.S. 14-32.2. *See* G.S. 14-32.2(f), 90-321(h), 90-322(d).

90. See text accompanying notes 26 through 40.

91. G.S. 14-17, 14-18; *see* Thornburg, *North Carolina Crimes*, 69. Involuntary manslaughter is punishable as a Class F felony. Second degree murder is punishable as a Class B2 felony. The presumptive minimum sentence for a Class F felony ranges from thirteen to thirty-nine months depending on the defendant's prior record. The presumptive minimum sentence for a Class B2 felony ranges from ten years and five months to twenty-six years and one month, depending on the defendant's prior record.

92. *See* Davis v. Commonwealth, 335 S.E.2d 375 (Va. 1985), and text accompanying notes 26 through 40.

93. Simple assault on a handicapped person is a Class 1 misdemeanor under G.S. 14-32.1.

94. See text accompanying notes 16 through 20.

95. *See* Thornburg, *North Carolina Crimes*, 152. The unreasonable restraint or confinement of disabled and elder adults also may be prosecuted as kidnapping if the State can prove that the caretaker restrained or confined the adult through the use of force, threatened force, or fraud, for the purpose of terrorizing the victim or another person, doing serious bodily harm to the victim, or holding the victim hostage. G.S. 14-39; *see* Thornburg, *North Carolina Crimes*, 147–51. If the victim suffers serious bodily injury, the defendant is guilty of first degree kidnapping (a Class C felony). If the victim does not suffer serious bodily injury, the defendant is guilty of second degree kidnapping (a Class E felony).

96. The requirement of malice applies only in prosecutions for criminal abuse under G.S. 14-32.3(a). The State is not required to prove malice in a prosecution for criminal neglect based on unreasonable restraint or confinement under G.S. 14-32.3(b).

97. G.S. 14-72; *see* Thornburg, *North Carolina Crimes*, 157–63.

98. G.S. 14-100; *see* Thornburg, *North Carolina Crimes*, 229–32.

99. G.S. 14-118.4; *see* Thornburg, *North Carolina Crimes*, 197–98.

100. G.S. 108A-102(a).

101. G.S. 108A-103(b).

102. G.S. 108A-109.

103. Tatara, *Elder Abuse in the United States*, 99.

104. Toshio Tatara and Margaret Rittman, *Working Relationships Between APS/Aging Agencies and Law Enforcement Agencies* (Washington, D.C.: National Aging Resource Center on Elder Abuse, 1992).

105. *Id.*

106. David P. Matthews, "The Not-So-Golden Years: The Legal Response to Elder Abuse," 15 PEPPERDINE L.REV. 653, 658 (1988).

107. North Carolina is not alone in enacting criminal adult abuse statutes that contain vague or unclear provisions. *See* Stephen Crystal, "Elder Abuse: The Latest 'Crisis'," *The Public Interest* 88(Summer 1987): 56, 61–63; *see also* People v. McKelvey, 281 Cal.Rptr. 359, 361 (Cal.App. 1991) (criticizing the lack of clarity in California's criminal adult abuse law).

108. There is no data on the number of criminal prosecutions for adult abuse and neglect in North Carolina or the United States. It appears, however, that criminal prosecutions under adult abuse and neglect statutes are "almost nonexistent." Crystal, "Elder Abuse: The Latest 'Crisis'," *The Public Interest* 88(Summer 1987): 56, 63. The program manager for the North Carolina's APS program stated that she has been aware of only a few prosecutions for patient abuse and neglect under G.S. 14-32.2. Telephone conversation with Vicki Kryk, N.C. Division of Social Services, March, 1996.

The Institute of Government of The University of North Carolina at Chapel Hill has printed a total of 2265 copies of this public document at a cost of $2082.21 or $0.92 each. These figures include only the direct costs of reproduction. They do not include preparation, handling, or distribution costs. To order copies of the Bulletin or to request a catalog of other Institute of Government publications, write to the Publications Marketing and Sales Office, CB# 3330 Knapp Building, UNC-CH, Chapel Hill, NC 27599-3330, or call (919) 966-4119 for price information.