

DISINHERITING ABUSIVE HEIRS: COULD A U.S.-INFORMED RESPONSE TO ELDER FINANCIAL ABUSE BE UTILIZED IN AUSTRALIA?

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ABSTRACT

Elder financial abuse (“EFA”) is a complex and pervasive global problem requiring “outside the box” legal solutions. One example of a novel approach is the U.S. method of disinheriting perpetrators utilizing an expanded slayer rule. The first of its kind in a common law country, the unique laws may demonstrate how succession law can play an important role in the legal response to EFA. In Australia, older people also face increasing threats of financial abuse, arguably perpetuated by an inadequate legal response, enabling victims to be overlooked. It has been eight years since Australia’s leading law reform body, the Australian Law Reform Commission, rejected the adoption of disinheritance laws based on the U.S. slayer rule model, seemingly placing it in the “too hard basket,”¹ during which time the impact of EFA has not abated. However, the Commission did acknowledge that elder abuse is a human rights issue, and any legal response must be viewed through a rights-based lens.² Given the legislative inaction and growing prevalence of EFA, this Essay argues that it is time for Australian jurisdictions to explore adopting disinheritance laws, based on the U.S. expanded slayer rule models, to sanction perpetrators of EFA and safeguard the human rights of older people. To do so, it is necessary to better understand the operation of the various U.S. disinheritance models to ensure that any arguments supporting reform in Australia are based on robust, qualitative evidence. There is currently

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1. See AUSTL. L. REFORM COMM’N, ELDER ABUSE—A NATIONAL LEGAL RESPONSE 281 (2017).

2. *Id.* at 48–50.

a gap in knowledge about the efficacy of each of these models and how the U.S. legal profession utilizes them. Filling this gap would arguably allow countries like Australia to learn from the U.S. experience, as well as benefit other U.S. jurisdictions seeking to adopt similar laws.

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INTRODUCTION

It is estimated that elder financial abuse (“EFA”), a common sub-type of elder abuse, costs older Americans more than \$28 billion annually.³ This pervasive social, public health, and human rights issue is not unique to the United States.

Consider the story of Australian widow, Aviva Cohen. After her husband’s death, the seventy-eight-year-old woman purchased a modest apartment in Lane Cove, an affluent suburb on Sydney’s lower North Shore.⁴ Prior to making the purchase, Aviva executed and registered an enduring power of attorney (similar to a U.S. durable power of attorney) authorizing her only child, Shalom Cohen, to legally act on her behalf with respect to making financial decisions, including selling property, even if she was to lose capacity.⁵ By June 2012, Aviva was experiencing short-term memory loss and macular degeneration and moved to an aged care facility in the neighboring suburb of Chatswood.⁶ At the time, a financial assessment noted that the Lane Cove apartment was the only real or personal property of value Aviva owned.⁷ Shortly after the move to aged care, Shalom transferred the Lane Cove property to himself for the sum of one Australian dollar.⁸ To facilitate the property transaction, Shalom signed a transfer document both as transferor, in his capacity as Aviva’s attorney, and transferee.⁹ Once he was registered as the sole owner of Lane Cove, Shalom resigned his position as his mother’s attorney, leaving the New South Wales

3. JILENNE GUNTHER, AARP, THE SCOPE OF ELDER FINANCIAL EXPLOITATION: WHAT IT COSTS VICTIMS 1 (2023).

4. *See Cohen v Cohen* [2016] NSWSC 336, ¶¶ 8, 14 (Austl.).

5. *Id.* ¶ 9.

6. *Id.* ¶¶ 5, 25.

7. *See id.* ¶ 23.

8. *Id.* ¶¶ 17–18.

9. *Id.*

Trustee and Guardian¹⁰ to oversee Aviva's affairs.¹¹ Without the benefit of the Lane Cove property, Aviva's government pension was unable to meet the aged care facility's fees, and she soon accumulated a debt of almost 27,000 Australian dollars.¹² With her entire pension used to pay the facility and no other assets from which to draw, Aviva was left with no money to buy any comforts or cover other necessary welfare expenses.¹³

Cases like Aviva Cohen's have become all too familiar in Australia. Shalom's conduct—misusing a power of attorney to deprive his older mother of her only asset—is a common form of EFA.¹⁴ This Essay argues that amid the increasing threat of EFA and a legal response that fails to deliver justice, disincentivize abuse, or protect the human rights of older people, it is time to look to the “legal left field” for a new approach. For Australia, an answer may lie in the United States, where ten states take the unprecedented approach of using succession laws to disinherit elder abuse offenders.¹⁵ The United States is unique among common law countries because of its sanction of elder abuse perpetrators by barring inheritance, generally effectuated by extending the scope of existing slayer rules.¹⁶ This novel approach provides a potential demonstration of how the law can

10. The New South Wales Trustee and Guardian is a state government agency responsible for making healthcare decisions and/or managing the financial affairs for those who are legally incapable of doing so themselves and do not have a suitable person to act on their behalf. *NSW Trustee and Guardian*, NSW GOV'T, <https://www.nsw.gov.au/departments-and-agencies/trustee-guardian> [https://perma.cc/6QHT-UD8N] (last visited Apr. 21, 2025).

11. *Cohen* [2016] NSWSC at ¶¶ 21, 27.

12. *See id.* ¶¶ 33–35.

13. *Id.* ¶ 36.

14. *See* Sarah Russell, *The Rise - and Risk - of “Early Inheritance Syndrome,”* SYDNEY MORNING HERALD (June 13, 2017), <https://www.smh.com.au/opinion/the-rise-and-risk-of-early-inheritance-syndrome-20170613-gwq42d.html> [https://perma.cc/5MY9-S8CN].

15. WASH. REV. CODE § 11.84.020 (2024); OR. REV. STAT. §§ 112.457, 112.465 (2024); CAL. PROB. CODE § 259 (West 2024); ARIZ. REV. STAT. ANN. § 46-456 (2024); KY. REV. STAT. ANN. § 381.280 (West 2025); FLA. STAT. § 732.8031 (2024); MD. CODE ANN., CRIM. LAW § 8-801 (West 2024); 20 PA. CONS. STAT. §§ 2106, 2507, 8801-8816 (2024); MICH. COMP. LAWS § 700.2803 (2024); 755 ILL. COMP. STAT. ANN. 5/2-6.6 (West 2024).

16. *See* Carla Spivack, *Let's Get Serious: Spousal Abuse Should Bar Inheritance*, 90 OR. L. REV. 247, 278 (2011); Jennifer Piel, *Expanding Slayer Statutes to Elder Abuse*, 43 J. AM. ACAD. PSYCHIATRY L. 369, 369–70 (2015).

impact social change by altering the ageist attitudes enabling abuse and reinforcing values which safeguard the human rights of older people.¹⁷ The U.S. model recognizes that offenders are most often trusted relatives or friends who are likely to benefit from the deceased's estate,¹⁸ and seeks to deter contemptible conduct by disincentivizing abusive and exploitative behavior.¹⁹ In contrast, succession law throughout Australia is rarely considered a primary tool to prevent elder abuse, and financial abuse perpetrators are seldom disinherited as a result of their conduct.²⁰

While Australia and the United States are geographically distant, the legal systems are closely related. Both common law countries have constitutional foundations, and there is a shared commitment to the values that uphold their respective representative democracies. Categorized as "Washminster,"²¹ Australia's political system is not a carbon copy of its colonial ancestor's Westminster model, but rather a hybrid "mutation" of both British and U.S. democratic systems, with several of its own unique elements.²² Both federalist countries, Australia and the United States have succession laws that are defined by state legislatures and courts, resulting in varying laws across jurisdictions.²³ These similarities make the United States and Australia ideal subjects to share knowledge, facilitating a better understanding of the complexities of EFA, and developing

17. See Spivack, *supra* note 16, at 259–60, 276 (arguing that disinheritance has the potential to effect greater societal change in relation to spousal abuse).

18. See Piel, *supra* note 16, at 369.

19. *Id.*; AUSTL. L. REFORM COMM'N, *supra* note 1, at 279–80.

20. Barbara Hamilton, *Be Nice to Your Parents: Or Else!*, 4 ELDER L. REV., no. 8, 2006, at 1, 4–5; see, e.g., *Waters v Odell* [2023] QDC 44, 67 (Austl.) (declining to impose a disinheritance sanction on an elder financial abuse perpetrator).

21. See Elaine Thompson, *The 'Washminster' Mutation*, 15 POLITICS, no. 2, 1980, at 32, 32.

22. See *id.* at 32–33; Dennis C. Grube, *Not-Minster? Australia's Bespoke System of Government*, in THE OXFORD HANDBOOK OF AUSTRALIAN POLITICS 95, 101 (Jenny M. Lewis & Anne Tiernan eds., 2021); Haig Patapan, *Separation of Powers in Australia*, 34 AUSTL. J. POL. SCI. 391, 391 (1999).

23. Compare U.S. CONST. amend. X (reserving powers not delegated to the federal government to the states, allowing them to regulate succession laws), with *Australian Constitution* s 51 (enumerating federal powers and leaving succession laws to the states by omission).

informed legal solutions that deliver better outcomes for older people and improve the aging experience.

Part I of this Essay looks at the increasing threat of EFA, in both Australia and the United States, and briefly outlines the wide-ranging consequences of financially exploitative conduct on older people. Part II then provides the context of Australia's current legal response to EFA, highlighting notable criticisms and the necessity of exploring a different approach, as demonstrated by the United States. Part III takes a closer look at the U.S. novel disinheritance solution, using succession laws to address a public health, economic, and human rights issue by disinheriting perpetrators, and highlights the gaps in understanding the effectiveness of the laws. Finally, Part IV contemplates what's next for EFA disinheritance in Australia and the United States. It suggests research studies that would help fill critical gaps in understanding the U.S. disinheritance model so countries like Australia could consider adopting similar laws.

I. ELDER FINANCIAL ABUSE: A SHARED PROBLEM

The prevalence, nature, and consequences of EFA illustrate the shameful treatment and disrespect a growing number of older people in the United States and Australia experience. While the legal definition varies across jurisdictions, the World Health Organization simply describes EFA as "the illegal or improper exploitation and/or use of funds or resources" of the older person.²⁴ Unlike other forms of elder abuse, it can occur without the older person's knowledge²⁵ and manifests in several ways, including taking money or property without permission, pressuring or threatening an older person to provide a loan or change their will, deliberately or unintentionally misusing a power of attorney, and/or preventing access to money or

24. WORLD HEALTH ORG., MISSING VOICES: VIEWS OF OLDER PERSONS ON ELDER ABUSE 3 (2002).

25. See Amanda Phelan, *Financial Abuse of Older People*, in ADVANCES IN ELDER ABUSE RESEARCH 101, 101–02 (Amanda Phelan ed., 2020).

other assets.²⁶ In Australia and the United States, data relating to EFA is limited,²⁷ and likely to inaccurately reflect the true number of victims due to severe underreporting.²⁸ However, it is estimated that 2.1% of older Australians aged sixty-five years and over experienced at least one form of financial abuse in 2019.²⁹ In the United States, 5.2% of people aged sixty years and over are thought to have been victims of financial abuse or exploitation, most commonly at the hands of a family member.³⁰ While these prevalence statistics are drawn from studies conducted pre-pandemic, it is expected that abuse rates rose during the COVID-19 pandemic,³¹ with one U.S. study finding an

26. LIXIA QU, RAE KASPIEW, RACHEL CARSON, DINIKA ROOPANI, JOHN DE MAIO, JACQUI HARVEY & BRIONY HORSFALL, AUSTL. INST. OF FAM. STUD., NATIONAL ELDER ABUSE PREVALENCE STUDY 35 (2021).

27. Andre B. Rosay & Carrie F. Mulford, *Prevalence Estimates and Correlates of Elder Abuse in the United States: The National Intimate Partner and Sexual Violence Survey*, 29 J. ELDER ABUSE & NEGLECT 1, 1 (2017); AUSTL. L. REFORM COMM'N, *supra* note 1, at 21, 93–95; QU ET AL., *supra* note 26, at 1; COUNCIL OF ATT'YS-GEN., NATIONAL PLAN TO RESPOND TO THE ABUSE OF OLDER AUSTRALIANS (ELDER ABUSE) 2019-2023 13–14 (2019).

28. AUSTL. L. REFORM COMM'N, *supra* note 1, at 94 (“Western Australia Police noted the problem of determining the prevalence of elder abuse due to underreporting.”); *Get the Facts on Elder Abuse*, NAT'L COUNCIL ON AGING (July 8, 2024), <https://www.ncoa.org/article/get-the-facts-on-elder-abuse/> [<https://perma.cc/695Y-KX44>] (estimating that “only 1 in 24 cases of [U.S. elder] abuse are reported to authorities”).

29. QU ET AL., *supra* note 26, at 33.

30. Ron Acierno, Melba A. Hernandez, Ananda B. Amstadter, Heidi S. Resnick, Kenneth Steve, Wendy Muzzy & Dean G. Kilpatrick, *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, 100 AM. J. PUB. HEALTH 292, 294 (2010); *see also* GUNTHER, *supra* note 3, at 7 (finding that perpetrators of elder financial exploitation are often people the victim knows).

31. *Abuse of Older People*, WORLD HEALTH ORG. (June 15, 2024), <https://www.who.int/news-room/fact-sheets/detail/abuse-of-older-people> [<https://perma.cc/5XD3-7A3F>]; *see, e.g., Age Discrimination Commissioner: Australia Has a Long Way to Go to End Elder Abuse*, AUSTL. HUM. RTS. COMM'N (June 13, 2024), <https://humanrights.gov.au/about/news/media-releases/age-discrimination-commissioner-australia-has-long-way-go-end-elder-abuse> [<https://perma.cc/8Z4W-C8WM>] (finding that the increased rate for calls to the National Elder Abuse phone line by 36% between July 2022 to May 2023 and July 2023 to May 2024 could be indicative of increased rates of elder abuse from COVID-19 aftermath). A “distressing” report shows elder abuse rose during the pandemic. Antonia O’Flaherty, *Queensland Elder Abuse Hotline Records Almost 32pc Increase in Reports*, ABC NEWS (Feb. 1, 2022, 6:41 PM), <https://www.abc.net.au/news/2022-02-02/queensland-elder-abuse-helpline-receives-increase-in-reports/100797078> [<https://perma.cc/HAJ7-QDM3>] (finding a 31.8% increase in calls to Queensland elder abuse helpline during the pandemic could be indicative of increased elder abuse).

increase of up to 84%.³² Notably, a national prevalence study in Australia has not been conducted post-pandemic to substantiate the anticipated increase. However, several of the country's elder abuse helplines reported an increase in demand since the start of the pandemic, with the National Elder Abuse hotline (1800 ELDERHelp) recording a 28% increase in calls in the first half of 2023.³³ Similarly, aged rights advocates have seen increased demand for victim support, with some service providers recording a 40% rise in the first quarter of 2023.³⁴

In Australia, several economic, legal, and social factors have created “perfect storm” conditions for the perpetration of EFA.³⁵ Demographically, over the next four decades, Australia's population is projected to become the oldest it has ever been.³⁶ Economically, this will result in the largest transfer of intergenerational wealth in Australia's history, with three-and-a-half

32. E-Shien Chang & Becca R. Levy, *High Prevalence of Elder Abuse During the COVID-19 Pandemic: Risk and Resilience Factors*, 29 AM. J. GERIATRIC PSYCHIATRY 1152, 1159 (2021).

33. Kay Patterson, *Building a Better Cultural Inheritance for an Ageing Australia*, AUSTL. HUM. RTS. COMM'N (June 28, 2023), https://humanrights.gov.au/about/news/speeches/building-better-cultural-inheritance-ageing-australia#_edn15 [<https://perma.cc/RWN3-SRYC>]; see also Else Kennedy, ‘Confronting’: Alleged Elder Abuse Cases Rise Sharply in Australia amid Covid, THE GUARDIAN (Feb. 24, 2021, 11:30 AM), <https://www.theguardian.com/australia-news/2021/feb/25/confronting-alleged-elder-abuse-cases-rise-sharply-in-australia-amid-covid> [<https://perma.cc/5JSE-UJH8>] (finding that the NSW aging and disability commission helpline received 25% more calls from 2021 to 2020, and the Tasmania elder abuse hotline received 67% more calls from 2019 to 2020 as compared to 2018 to 2019); ANNA GILLBARD & CHEZ LEGGATT-COOK, ELDER ABUSE STATISTICS IN QUEENSLAND: YEAR IN REVIEW 2022-23, at 9 (2023), <https://eapu.com.au/wp-content/uploads/2024/02/EAPU-Year-in-Review-2023.pdf> (finding that the Queensland Elder Abuse Hotline received 17.2% more calls from 2022 to 2023 than 2021 to 2022).

34. Patterson, *supra* note 33; see also Kennedy, *supra* note 33 (finding that “organisations in Victoria, NSW, Tasmania, ACT, and the Northern Territory” reported increased help requests in 2020).

35. Sherif Soliman & Jason Beaman, *One Piece of the Puzzle – Financial Exploitation and Elder Abuse*, in AGING AND MONEY: REDUCING RISK OF FINANCIAL EXPLOITATION AND PROTECTING FINANCIAL RESOURCES 16 (Ronan M. Factora ed., 2d ed. 2021); Patterson, *supra* note 33; *Australia May Be Headed for a “Perfect Storm” of Age Discrimination. Here's Why*, SBS NEWS (June 28, 2023, 1:44 PM), <https://www.sbs.com.au/news/article/australias-population-will-be-the-oldest-its-ever-been-but-it-could-cause-discrimination/2cpj5xxok> [<https://perma.cc/XNY8-YN6W>].

36. Patterson, *supra* note 33; COMMONWEALTH OF AUSTL., INTERGENERATIONAL REPORT 2023: AUSTRALIA'S FUTURE TO 2063, at 46–47 (2023) (“Population ageing is one of the major forces shaping Australia's future The population is expected to continue to age over the next 40 years”).

trillion Australian dollars expected to pass from Baby Boomers to younger generations in the coming decades.³⁷ However, current social attitudes suggest that feelings of entitlement among younger generations, potentially fueled by cost of living pressures that can motivate EFA perpetrators, is also leading to increased levels of abuse.³⁸ This has allowed a new sub-type of financial abuse to emerge, categorized as “inheritance impatience” or “early inheritance syndrome,” where adult children seek access to their assumed inheritance before their (frequently older) parents die.³⁹ A challenging economic and real estate climate coupled with an aging population and changes to the transfer of generational wealth has created conditions ideal for EFA to thrive.⁴⁰

Older Australians are broadly hesitant to rely on the law to stop abuse, and when they do, the path to legal redress is rarely straightforward.⁴¹ As articulated by the United Nations Sustainable Development Goals (“SDGs”), everyone, regardless of age, should feel safe and enjoy equal access to justice, allowing for the protection of universal rights and resolution of disputes.⁴²

37. AUSTL. GOV'T PRODUCTIVITY COMM'N, WEALTH TRANSFERS AND THEIR ECONOMIC EFFECT 62 (2021); Patterson, *supra* note 33.

38. See ADAM DEAN, ELDER ABUSE KEY ISSUES AND EMERGING EVIDENCE 16 (2019); RAE KASPIEW, RACHEL CARSON & HELEN RHOADES, ELDER ABUSE: UNDERSTANDING ISSUES, FRAMEWORKS AND RESPONSES 18–19 (2016); Patricia Brownell, *Social Issues and Social Policy Response to Abuse and Neglect of Older Adults*, in AGING, AGEISM AND ABUSE 1, 1 (Gloria Gutman & Charmaine Spencer eds., 2010).

39. Tracey West & Nicholas Drew, *Abuse of Enduring Power of Attorneys and Real Estate Transactions in Australian Courts*, 30 J. FIN. CRIME 1220, 1223 (2023); BRIDGET LEWIS, KELLY PURSER & KIRSTY MACKIE, THE HUMAN RIGHTS OF OLDER PERSONS – A HUMAN RIGHTS-BASED APPROACH TO ELDER LAW 22 (2020); Liz Farquhar, *Legal Service Links Rising House Prices to High Rates of Elder Abuse*, ABC NEWS (Nov. 4, 2021), <https://www.abc.net.au/news/2021-11-05/high-house-prices-linked-to-elder-abuse/100593796> [<https://perma.cc/A5NZ-KFEE>]; Russell, *supra* note 14.

40. Julia Cook & Peta S. Cook, *Intergenerational Financial Assistance with Home Ownership: Considering the Potential for Financial Elder Abuse*, AUSTL. J. SOC. ISSUES, Jan. 2024, at 1, 11–12; FED’N OF ETHNIC COMMUNITIES’ COUNCIL OF AUSTL., REVIEW OF AUSTRALIAN RESEARCH ON OLDER PEOPLE FROM CULTURALLY AND LINGUISTICALLY DIVERSE BACKGROUNDS 6 (2015).

41. QU ET AL., *supra* note 26, at 3 (“Actions to stop abuse involving legal services . . . [are] not common.”).

42. G.A. Res. 70/1, at 3, 6 (Sept. 25, 2015); *Peace, Justice and Strong Institutions*, UNITED NATIONS, <https://www.un.org/sustainabledevelopment/peace-justice/> [<https://perma.cc/85SR-8B8T>] (last visited Feb. 15, 2025).

For many older Australians, the law does not offer an easily accessible solution for stopping abuse.⁴³ Over two-thirds of EFA victims do not seek help or advice, potentially fearing repercussions from the perpetrator, feeling shame or embarrassment, and/or they are concerned about the financial and emotional costs of accessing help.⁴⁴ For the 33% of older people who experience EFA and try to access legal help,⁴⁵ they face significant barriers in an already overwhelming process. The costs and practicalities of obtaining legal advice can be prohibitive,⁴⁶ and the challenge of overcoming the obstacles that may result from EFA can be insurmountable.⁴⁷ Consequently, denying access to justice to older people perpetuates the silence around EFA, restricts the exercise of rights, and limits holding offenders accountable.⁴⁸

Internationally, elder abuse is recognized as a critical human rights issue.⁴⁹ According to the *Universal Declaration of Human Rights*, everyone has the right to an adequate standard of living for their well-being, and to security as they age.⁵⁰ Further, a range of soft-law instruments maintain that older people should have the freedom to live in dignity, in a demonstration

43. QU ET AL., *supra* note 26, at 3.

44. *See id.* at 83; LEWIS ET AL., *supra* note 39, at 194; Briony Dow, Luke Gahan, Ellen Gaffy, Melanie Joosten, Freda Vrantzidis & Meaghan Jarred, *Barriers to Disclosing Elder Abuse and Taking Action in Australia*, 35 J. FAM. VIOLENCE 853, 856–58 (2020).

45. QU ET AL., *supra* note 26, at 84.

46. Kelly Purser, Tina Cockburn, Cassandra Cross & Helene Jacmon, *Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study*, 48 BRIT. J. SOC. WORK 887, 899 (2018); AUSTL. L. REFORM COMM'N, *supra* note 1, at 207; *see also* DEAN, *supra* note 38, at 19 (discussing other barriers to reporting elder abuse and accessing legal services, such as fear, shame, or a concern for the adult children).

47. *See* Purser et al., *supra* note 46, at 901; AUSTL. L. REFORM COMM'N, *supra* note 1, at 207.

48. *See generally* *Access to Justice*, UNITED NATIONS & THE RULE OF L., <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> [<https://perma.cc/V7YM-GUNJ>] (last visited Feb. 20, 2025) (“Access to justice is a basic principle of the rule of law.”).

49. *See* KASPIEW ET AL., *supra* note 38, at 1, 28; QU ET AL., *supra* note 26, at 8; AUSTL. L. REFORM COMM'N, *supra* note 1, at 48–49; *see also* Wendy Lacey, *Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia*, 36 SYDNEY L. REV. 99, 113 (2014) (“A person cannot lose the entitlement to enjoy universal human rights and freedoms simply because they fall into the category of ‘older’ person.”).

50. G.A. Res. 217 (III) A, *Universal Declaration of Human Rights*, art. 25(1) (Dec. 10, 1948).

of autonomy, absent the threat of abuse and exploitation.⁵¹ While those with greater financial security generally enjoy greater access to human rights,⁵² where a victim's resources have been drained as a result of EFA, the consequences can pose a serious threat to these fundamental rights and theoretical principles.⁵³ Often, the victim will have limited means or opportunity to recoup the losses sustained through abuse and rebuild their financial assets,⁵⁴ potentially driving them into poverty and/or homelessness.⁵⁵ This can subsequently restrict a victim's access to the highest attainable standard of living and be forced into aged care where they can no longer afford in-home care or housing costs.⁵⁶ From a physical and mental health perspective, those who have suffered financial devastation experience an increased mortality rate compared to other older people who do not encounter financial abuse.⁵⁷ Financial exploitation may also lead to a decline in mental health, with victims often feeling humiliated and depressed by the abuse and, in some cases, suicidal.⁵⁸ Similar to its impact on housing, financial abuse can also violate an older person's right to adequate health care, with

51. G.A. Res. 46/91, ¶¶ 17–18 (Dec. 16, 1991).

52. LEWIS ET AL., *supra* note 39, at 19.

53. *Id.*

54. Mary M. Gilhooly, Gillian Dalley, Kenneth J. Gilhooly, Mary P. Sullivan, Priscilla Harries, Michael Levi, Deborah C. Kinnear & Miranda S. Davies, *Financial Elder Abuse Through the Lens of the Bystander Intervention Model*, 26 PUB. POL'Y & AGING REP. 5, 6 (2016); KASPIEW ET AL., *supra* note 38, at 9; Phelan, *supra* note 25, at 110.

55. LEWIS ET AL., *supra* note 39, at 19; see Andie MacNeil & David Burnes, *Bridging the Gap Between Homelessness in Older Adulthood and Elder Abuse: Considerations for an Age-Friendly Shelter System*, 34 J. AGING & SOC. POL'Y 391, 395–96 (2022).

56. See Emily Irwin, Note, *Protecting Mamaw and Her Estate: Elder Abuse Disinheritance in Kentucky*, 54 U. LOUISVILLE L. REV. 307, 308 (2016); LEWIS ET AL., *supra* note 39, at 176; KASPIEW ET AL., *supra* note 38, at 9; Gilhooly et al., *supra* note 54, at 6; see, e.g., *Cohen v Cohen* [2016] NSWSC 336, ¶ 36 (Austl.).

57. Jennifer E. Storey, *Risk Factors for Elder Abuse and Neglect: A Review of the Literature*, AGGRESSION & VIOLENT BEHAV., Sept. 2019, at 1, 2 (“[I]ndeed, elder abuse victims experience a mortality rate three times higher than that of non-victims.” (citation omitted)).

58. Gilhooly et al., *supra* note 54, at 6; CASSANDRA CROSS, THE DONALD MACKAY CHURCHILL FELLOWSHIP TO STUDY METHODS FOR PREVENTING AND SUPPORTING VICTIMS OF ONLINE FRAUD 36 (2012).

victims no longer able to fund private healthcare forced into the public system.⁵⁹

Often, the consequences of EFA are minimized, as older people experience ageist and negative stereotypes, which can lead to feeling insecure, isolated, and invisible.⁶⁰ Stereotypically, older people are seen as “onlookers” who lack purpose and can no longer actively contribute to society.⁶¹ This view is further amplified by the media, framing aging as a negative experience, with older people depicted as a social and economic burden and positioned as competitors to younger generations for resources like housing and health services.⁶² These prejudiced attitudes can allow an EFA perpetrator to rationalize their abusive conduct, placing less value on an older person’s rights and in some instances believing the EFA was justified.⁶³ While not recognized as an express cause of EFA, the insidious nature of ageism contributes to a culture that allows abuse to go unremedied and unaddressed and can lead older people to feel

59. LEWIS ET AL., *supra* note 39, at 18–19; see also *Four Ways Elder Financial Abuse Leads to Medicaid Denials and How Legal Aid Can Help*, JUST. IN AGING (June 15, 2016), <https://justicein-aging.org/four-ways-elder-financial-abuse-leads-to-medicaid-denials-and-how-legal-aid-can-help/> [<https://perma.cc/J5NQ-PDRF>] (providing examples of how financial abuse affects elders who need Medicaid).

60. See Lacey, *supra* note 49, at 109.

61. AUSTL. HUM. RTS. COMM’N, *WHAT’S AGE GOT TO DO WITH IT?* 15 (2021).

62. See Stefan Hopf, Federica Previtali & Nena Georgantzi, *New Forms of Ageism as a Challenge for a UN Convention on the Rights of Older Persons*, 90 U. TORONTO Q. 242, 246 (2021); AUSTL. HUM. RTS. COMM’N, *supra* note 61, at 11; see, e.g., Nikki Sorbello & Grace Whiteside, *Aging Population, Migration Blamed for Queensland’s Bed Shortages, Ambulance Ramping*, ABC NEWS (Sept. 5, 2024), <https://www.abc.net.au/news/2024-09-06/aging-population-and-migration-blames-for-ramping-health-crisis/104313374> [<https://perma.cc/K4ZQ-489H>]; Michael Yardney, *The Silver Tsunami: How Our Aging Population Is Shaping Our Economy and Property Markets*, PROP. UPDATE (Dec. 30, 2024), <https://propertyupdate.com.au/the-silver-tsunami-how-our-aging-population-is-shaping-our-economy-and-property-markets/> [<https://perma.cc/KK2H-3Y5G>]; *Work Harder to Support Aging Population: oeCD*, ABC NEWS (Feb. 2, 2005), <https://www.abc.net.au/news/2005-02-03/work-harder-to-support-aging-population-oeCD/630098> [<https://perma.cc/GC2H-SLBD>]; Sheryl Gay Stolberg, *President Biden Is Turning 80. Experts Say Age Is More Than a Number.*, N.Y. TIMES (Nov. 19, 2022), <https://www.nytimes.com/2022/11/19/us/politics/biden-age-health.html> [<https://perma.cc/KD77-CF9D>].

63. Storey, *supra* note 57, at 5; see Deborah Henderson, Jeffrey A. Buchanan & Jane E. Fisher, *Violence and the Elderly Population: Issues for Prevention*, in PREVENTING VIOLENCE IN RELATIONSHIPS: INTERVENTIONS ACROSS THE LIFE SPAN 223, 226–27 (Paul A. Schewe ed., 2002).

shame and deserving of abuse.⁶⁴ This can prevent victims from seeking help, perpetuating the silent cycle of abuse and limiting the right to access justice.⁶⁵ While governments at all levels recognize that urgent action is needed to reduce the threat of elder abuse, in Australia, the true extent of EFA and the best way to respond, remains unclear.⁶⁶

II. AUTONOMY, DIGNITY, SAFEGUARDING: THE AUSTRALIAN LEGAL RESPONSE

How to respond to this increasing threat to the health and security of older people is a subject challenging policy and lawmakers around the world. In Australia, a 2017 report released by the Australian Law Reform Commission (“ALRC”) found more needed to be done to protect older people from abuse, while also respecting and safeguarding key human rights principles, including respect for autonomy, dignity, and security.⁶⁷ This delicate balancing act requires legal solutions that deter and sanction abuse to safeguard a victim’s dignity and security without imposing laws that compromise an older person’s right to autonomy or restricts any freedoms.⁶⁸ For example, forcing an older adult to accept help or report financial abuse may ultimately seek to protect security and dignity, but it also removes power from the older person to make their own decision.⁶⁹ Unlike the United States,⁷⁰ Australia does not have mandatory reporting laws for any form of elder abuse, with stakeholders describing it as “intrusive and patronizing,”⁷¹ which “casts elders

64. See COUNCIL OF ATT’YS-GEN., *supra* note 27, at 5; Patterson, *supra* note 33.

65. See Patterson, *supra* note 33.

66. See COUNCIL OF ATT’YS-GEN., *supra* note 27, at 6–7.

67. See AUSTL. L. REFORM COMM’N, *supra* note 1, at 3, 20.

68. See *id.* at 20.

69. See *id.* at 20–21.

70. NAT’L CTR. ON ELDER ABUSE & NAT’L ADULT PROTECTIVE SERVS. ASS’N, MANDATED REPORTING OF ABUSE OF OLDER ADULTS AND ADULTS WITH DISABILITIES 1 (2019).

71. AUSTL. L. REFORM COMM’N, *supra* note 1, at 416 (citing STATE TRS. VICTORIA, INQUIRY INTO ELDER ABUSE: SUBMISSION BY STATE TRUSTEES LIMITED 5 (2016)).

essentially as children reinforcing ageist attitudes”⁷² and “undermines the rights of older people to make their own decisions.”⁷³ Australia’s Age Discrimination Commissioner identified that in circumstances where attitudes favor protection over an older person’s freedom and independence, this benevolent form of ageism can lead to elder abuse.⁷⁴ It is clear that in Australia autonomy, dignity, and safeguarding are human rights values and the guiding principles that frame Australia’s response to EFA, and by which any new legal solutions will be assessed.

Where legal action is pursued by the victim or their estate, there are limited private civil actions available under Australian laws to remedy EFA.⁷⁵ Predominately rooted in equity, action commonly taken includes: breach of fiduciary duty, particularly in circumstances where a power of attorney appointment has been used to facilitate EFA;⁷⁶ undue influence and unconscionable conduct;⁷⁷ and/or the unconscionable denial of a beneficial interest in property, typically where an older person has transferred their real property or money to a family member or trusted friend in return for a promise of ongoing care, support and housing, and that agreement subsequently breaks down.⁷⁸ In some circumstances, other statutory or common law principles may be pleaded in the alternative. However, the nature of remedies available under these equitable actions can make them more preferable to statutory redress.⁷⁹ Unlike the United

72. *Id.* (citing RELATIONSHIPS AUSTL., RESPONSE TO ALRC ISSUES PAPER ELDER ABUSE 2).

73. *Id.* (citing NAT’L SENIORS AUSTL., SUBMISSION THE ELDER ABUSE INQUIRY: RESPONSE TO THE ISSUES PAPERS 41 (2016)).

74. Patterson, *supra* note 33.

75. See Hamilton, *supra* note 20, at 3.

76. See, e.g., *Cohen v Cohen* [2016] NSWSC 336, ¶¶ 63–65 (Austl.); *Hrycenko (by His Litig Guardian Michael Kornitschuk) v Hrycenko* [2019] VSC 700, ¶¶ 7, 13 (Austl.).

77. See, e.g., *Western v Male* [2011] SASC 75 (Austl.); *Badman v Drake* [2008] NSWSC 1366, ¶ 69 (Austl.).

78. AUSTL. L. REFORM COMM’N, *supra* note 1, at 203; see, e.g., *Swettenham v Wild* [2005] QCA 264, ¶¶ 19–21, 26–27 (Austl.); *Field v Loh* [2007] QSC 350, ¶¶ 9–11, 17 (Austl.).

79. Kelly Purser, Tina Cockburn & Elizabeth Ulrick, *Examining Access to Formal Justice Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney*, 12 ELDER L. REV.,

States, equity and law remain largely distinct in Australia, with state and federal courts recognizing equity's jurisdiction and the equitable nature of certain actions and remedies.⁸⁰ For example, in EFA cases, types of equitable relief ordered may include: equitable compensation for the loss of property and/or money;⁸¹ where real property has been improperly transferred, the transaction may be set aside;⁸² account of profits;⁸³ and/or that the property subject to the claim be held on resulting or constructive trust for the victim's benefit.⁸⁴ When providing a remedy, equity seeks "practical justice" between the parties, providing restitution rather than punishing a party engaged in wrongdoing.⁸⁵ A person who seeks equity must do equity, so relief may be subject to conditions, including allowances and set-offs.⁸⁶ Even when a financial sanction would arguably deter others from committing a similar infraction, punitive damages generally cannot be awarded for equitable actions in Australia.⁸⁷ This position is juxtaposed with some U.S. states that have enacted legislation that can impose heightened damages for

no. 6, 2019, at 1, 20. For example, each State and Territory has legislation that governs the use of power of attorney appointments. Similarly, failed joint endeavors between family members may give rise to a claim under the Property (Relationships) Act 1984. *See Property (Relationships) Act 1984* (NSW) (Austl.). However, there can be strategic benefits to relying on statutory actions, *see, e.g., Powers of Attorney Act 1998* (Qld) s 87 (Austl.), which gives rise to a presumption of undue influence in transactions between a principal and an attorney appointed under an enduring power of attorney.

80. For general discussion regarding the merger of equity and law in the United States, *see* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 533–34 (2016); Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1054, 1056–57 (2021); Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBS. 53, 53–54 (1993).

81. *See, e.g., Perpetual Tr Co Ltd v Gibson* [2013] NSWSC 276, ¶¶ 3, 36, 38 (Austl.); *Badman* [2008] NSWSC ¶¶ 90–93; *Smith v Glegg* [2004] QSC 443, ¶¶ 64, 70 (Austl.).

82. *See, e.g., Cohen v Cohen* [2016] NSWSC 336, ¶¶ 68, 71 (Austl.); *Fisher-Pollard (by Her Tutor Miles Fisher-Pollard) v Fisher-Pollard* [2018] NSWSC 500, ¶¶ 138–40 (Austl.).

83. *See, e.g., Moylan v Rickard* [2010] QSC 327, ¶ 130 (Austl.).

84. *See, e.g., Swettenham v Wild* [2005] QCA 264, ¶ 46 (Austl.); *Field v Loh* [2007] QSC 350, ¶¶ 28, 34 (Austl.).

85. *See Bridgewater v Leahy* [1998] HCA 66, ¶ 126 (Austl.).

86. *Giumelli v Giumelli* [1999] HCA 10, ¶ 64 (Austl.); *see also Field* [2007] QSC 350, ¶ 36 (allowing an offset for the accommodation costs incurred by the plaintiff while residing with the defendants).

87. *See, e.g., Harris v Digital Pulse Pty Ltd* [2003] 10 NSWLR 298 (Austl.).

property misappropriated through EFA, in some cases up to three times the economic damage suffered.⁸⁸

Beyond claims in equity to claw back assets into the estate, EFA is not typically considered a legal issue that can be fully addressed within the scope of succession law. An exception is testamentary undue influence, wherein the perpetrator's coercive conduct overbears the testator's autonomy and freedom to execute a will so that it no longer accurately represents their true testamentary intentions.⁸⁹ Similar to the United States, testamentary undue influence in Australia is historically difficult to establish,⁹⁰ with the absence of undue influence presumptions in probate matters posing a significant hurdle.⁹¹ The party who challenges the validity of the will bears the evidentiary burden of proving on the balance of probabilities that "there has been such undue pressure which has been brought to bear that the will can be said to have been . . . the product of this conduct."⁹² Given that the testator is dead and cannot provide evidence, circumstantial evidence is usually all that is available to discharge this burden.⁹³ Designed to safeguard the autonomy and subsequent testamentary freedom of vulnerable testators, including older people, the almost "insurmountable" challenge of establishing testamentary undue influence has sparked debate in Australia, questioning whether the law adequately safeguards

88. See, e.g., OR. REV. STAT. § 124.100 (2024). In California, the offender is liable for twice the value of property recovered. CAL. PROB. CODE § 859 (West 2023); *Keading v. Keading*, 275 Cal. Rptr. 3d 338, 347 (Cal. Ct. App. 2021).

89. See *Revie v Druitt* [2005] NSWSC 902, ¶ 51 (Austl.); *Tr for the Salvation Army (NSW) Prop Tr v Becker* [2007] NSWCA 136, ¶¶ 62–63 (Austl.); Mary-Ann de Mestre & Henry Kha, *Testamentary Undue Influence in Australia: Should It Be Reformed?*, 30 TRS. & TRS. 267, 271 (2024); AUSTL. L. REFORM COMM'N, *supra* note 1, at 271.

90. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3(b) (AM. L. INST. 2003); de Mestre & Kha, *supra* note 89, at 267. In the United States, it has been described as "one of the most bothersome concepts in all the law." See ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES* 289 (11th ed. 2022).

91. *Nicholson v Knaggs* [2009] VSC 64, ¶ 110 (Austl.).

92. *Id.* ¶ 111.

93. *Id.* ¶ 113; de Mestre & Kha, *supra* note 89, at 273.

those it seeks to protect.⁹⁴ However, in rare cases where the claim is successfully established, any dispositions that are the result of undue influence can be severed from the will and excluded from probate, or the entire will, if procured by undue influence, will be held invalid and denied probate.⁹⁵

Australia does not have a culture of disinheritance to punish perpetrators of EFA, and the doctrine of, for example, “unworthy heirs” is rarely considered in Australian scholarship. Generally, the law is hesitant to rely on the conduct of a beneficiary to bar inheritance completely. The notable exceptions are the forfeiture rule and disentitling conduct alleged as part of a family provision application (“FPA”).⁹⁶ The forfeiture rule in Australia is analogous to the U.S. slayer rule; a person who unlawfully kills another must not benefit from the victim’s estate.⁹⁷ Like the slayer rule, it is grounded in principles of equity and public policy: felonious killings are wrong, and equity will intervene to deny a benefit from wrongdoing and subsequently prevent unjust enrichment.⁹⁸ Since the 1994 foundational forfeiture rule case, *Troja v. Troja*, Australian jurisdictions have debated the rule’s application and its ability to deliver potentially unjust outcomes.⁹⁹ In *Troja*, the majority held that the rule must be strictly applied in all cases of felonious killings; the court does not have discretion to modify the rule depending on the

94. John Meredith, *Miami Advice or California Dreaming: A Statutory Presumption of Testamentary Undue Influence in Australia?*, 31 QUEENSLAND L. 170, 170 (2011); *Tr for the Salvation Army (NSW) Prop Tr* [2007] NSWCA ¶ 70; de Mestre & Kha, *supra* note 89, at 267–68.

95. See *In re Nickson* [1916] VLR 274, 284 (Austl.).

96. Hamilton, *supra* note 20, at 1, 8.

97. *Id.* at 1; *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147, 150.

98. *Troja v Troja* (1994) 33 NSWLR 269, 299 (Austl.); Karen J. Sneddon, *Should Cain’s Children Inherit Abel’s Property: Wading into the Extended Slayer Rule Quagmire*, 76 UMKC L. REV. 101, 138 (2007); Spivack, *supra* note 16, at 268–69.

99. See, e.g., Ken Mackie, *The Troja Case—Criminal Law, Succession and Law Reform*, 5 CANBERRA L. REV. 177, 177, 179 (1998) (using the *Troja* case as “a useful vehicle in the exploration of the limitations of the common law forfeiture rule”); TASMANIA L. REFORM INST., *THE FORFEITURE RULE 15–17* (2004) (suggesting reform in Tasmania in preparation for cases similar to *Troja*). See generally VICTORIA L. REFORM COMM’N, *THE FORFEITURE RULE* (2014) (concluding the application of the rule does not always lead to fair outcomes); S. AUSTL. L. REFORM INST., *RIDDLES, MYSTERIES AND ENIGMAS: THE COMMON LAW FORFEITURE RULE* (2020) (recommending reforms to the forfeiture rule to achieve clarity and fairness).

circumstances of the case.¹⁰⁰ However, critics of this strict approach argue that ignoring an offender's moral culpability risks the rule operating as a "vehicle of serious injustice,"¹⁰¹ producing unjust outcomes that can inflict further punishment on at-risk members of society, including intimate partner violence and family violence survivors.¹⁰² In three Australian jurisdictions, this debate has been settled by codifying the rule to allow for judicial discretion in its application,¹⁰³ while the remaining states rely on common law formulations of the rule, as established in the *Troja* decision.¹⁰⁴ However, unlike the slayer rule, in all Australian jurisdictions the forfeiture rule applies only when the beneficiary's conduct has resulted in the death of the decedent; it does not apply to any other outcome, including EFA.¹⁰⁵

Aside from the forfeiture rule, the only occasion where a beneficiary's behavior is considered in relation to inheritance is when raised as a disentitling conduct defense to a FPA.¹⁰⁶ Unlike the United States, succession laws in every Australian jurisdiction provide that a deceased's spouse, child, or dependent may apply for an increased benefit from the estate where they have not received adequate provision for their "proper maintenance

100. *Troja* (1994) 33 NSWLR at 299.

101. *Id.* at 285.

102. See Barbara Hamilton & Elizabeth Sheehy, *Thrice Punished: Battered Women, Criminal Law and Disinheritance*, 8 S. CROSS U. L. REV. 96, 96–97 (2004).

103. *Forfeiture Act 1991* (ACT) pt 3 (Austl.); *Forfeiture Act 1995* (NSW) pt 2 (Austl.); *Forfeiture Act 2024* (SA) pt 3 (Austl.).

104. *Troja* (1994) 33 NSWLR at 299. In Queensland the rule is applied inflexibly as established in *Pub Tr of Queensland v Pub Tr of Queensland & Ors* [2014] QSC 47, 52 (Austl.). However, in Victoria, the court has discretion to consider criminal culpability in instances of manslaughter. *Edwards v State Trs Ltd* (2016) 54 VR 1, 137 (Austl.).

105. Letter from Damon Quinn, CEO, NSW Tr. & Guardian, to Sabina Wynn, Exec. Dir., Austl. L. Reform Comm'n 10 (Aug. 18, 2016) [hereinafter Letter from NSW Tr. & Guardian]. Notably, extreme cases of elder abuse may result in death. See, e.g., *R v Miller* [2010] QSC 453, ¶¶ 10, 18–20 (Austl.) (providing an example of elder abuse resulting in death that could implicate the slayer rule).

106. See Hamilton, *supra* note 20, at 8.

and support.”¹⁰⁷ Courts are vested with a wide discretionary power when considering FPAs, including denying an increased benefit to an applicant whose character or conduct is deemed “disentitling.”¹⁰⁸ This may include any evidence of EFA perpetrated towards the deceased by the applicant.¹⁰⁹ Establishing disentitling conduct does not guarantee total disinheritance; the court has discretion to reduce the quantum of benefit awarded¹¹⁰ or refuse the offending beneficiary’s application for *additional* provision from the estate, however it cannot reduce the offender’s original inheritance made pursuant to a will or intestacy rules.¹¹¹ Further, successfully establishing disentitling conduct does not result in the perpetrator restoring misappropriated assets or paying back stolen money to the estate.¹¹² While it arguably is not a legal remedy designed to deter or punish EFA perpetrators, FPAs do demonstrate that the freedom to dispose of property upon death is not absolute and can be limited by laws.¹¹³

107. The precise terminology can differ across jurisdictions but is generally accepted to have the same scope and meaning. See *Succession Act 1981* (Qld) pt 4 ss 40–44 (Austl.); *Succession Act 2006* (NSW) ch 3 pt 3.2 (Austl.); *Administration and Probate Act 1958* (Vic) pt IV (Austl.); *Family Provision Act 1969* (ACT) ss 7–8 (Austl.); *Testator’s Family Maintenance Act 1912* (Tas) s 3 (Austl.); *Family Provision Act 1970* (NT) ss 7–8 (Austl.); *Family Provision Act 1972* (WA) s 7 (Austl.); *Succession Act 2023* (SA) pt 6 (Austl.).

108. See *Succession Act 1981* (Qld) pt 4 s 41(2)(c) (Austl.); *Family Provision Act 1972* (WA) s 6(3) (Austl.); *Testator’s Family Maintenance Act 1912* (Tas) s 8(1) (Austl.); *Family Provision Act 1970* (NT) s 8(3) (Austl.); *Succession Act 2023* (SA) pt 6 s 116(4) (Austl.); *Succession Act 2006* (NSW) s 60(2)(m) (Austl.).

109. See *Grant v Grant* [No.2] [2020] NSWSC 1288 ¶ 296 (Austl.).

110. *In re Paulin* [1950] VLR 462, 462 (Austl.).

111. See *Succession Act 1981* (Qld) pt 4 s 41(2)(c) (Austl.); *Inheritance (Family Provision) Act 1972* (SA) s 7(3) (Austl.); *Family Provision Act 1972* (WA) s 6(3) (Austl.); *Testator’s Family Maintenance Act 1912* (Tas) s 8(1) (Austl.); *Family Provision Act 1970* (NT) s 8(3) (Austl.); *Hughes v Nat’l Trs* (1979) 143 CLR 134, ¶ 28 (Austl.); *Hartley v Hartley* [2021] QDC 323, ¶¶ 63–65 (Austl.); *In re Paulin* [1950] VLR 462, 473 (Austl.).

112. *Waters v Odell* [2023] QDC 44, ¶¶ 207, 215 (Austl.) (tempering the provision to be made in light of “Ms. Odell’s self-help in respect of her mother’s money” but still providing inheritance).

113. *de Mestre & Kha*, *supra* note 89, at 267.

III. THE U.S. DISINHERITANCE APPROACH: DOES IT WORK?

Considering the reluctance of laws in Australia to disinherit heirs despite their abusive conduct towards the decedent, U.S. laws that expressly preclude elder abuse offenders from benefiting from the victim's estate piques curiosity. In a rare application of the unworthy heir concept, elder abuse disinheritance laws seek to reduce the prevalence of EFA by disincentivizing perpetrators while also acting to sanction abusive behavior where previous criminal laws have failed to deliver an effective reduction in abuse.¹¹⁴ The laws provide a civil action that can be pursued by victims and their estates in circumstances where the victim has died, rather than relying on criminal charges to be laid, which can be difficult to prosecute.¹¹⁵ Notably, the laws also serve a broader social purpose in a demonstration of the law's expressive function.¹¹⁶ In Pennsylvania, when passing the recently amended slayer bill to disinherit elder abuse offenders, the Bill's co-sponsor, Representative Hanbidge, said that the law would "send a clear message that financial exploitation and abuse of elders will not be tolerated," with bipartisan State Representatives acknowledging that older people "deserve dignity in their twilight years."¹¹⁷

Given each U.S. state's power to enact its own succession laws, there is not a singular model law that expands the scope

114. Travis Hunt, Note, *Disincentivizing Elder Abuse Through Disinheritance: Revamping California Probate Code § 259 and Using It as a Model*, 2014 BYU L. REV. 445, 453–55; Piel, *supra* note 16, at 369–70; Kymberleigh N. Korpus, Note, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight against Elder Abuse but Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 537, 569 (2001); Est. of Lowrie, 12 Cal. Rptr. 3d 828, 834–35 (Cal. Ct. App. 2004).

115. Korpus, *supra* note 114, at 575.

116. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025 (1996); RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 9 (2015).

117. *How to Shield Your Loved Ones from Financial Elder Abuse in Massachusetts*, JORDAN & WHITE LLC (Oct. 4, 2023), <https://jordanwhitelc.com/how-to-shield-your-loved-ones-from-financial-elder-abuse-in-massachusetts/> [https://perma.cc/UE6J-X2FY]; *Bipartisan Bill Protects PA Seniors: Slayer Statute Now Covers Elder Abusers*, LOCALNEWS1 (Dec. 18, 2023), <https://local-news1.org/2023/12/18/bipartisan-bill-protects-pa-seniors-slayer-statute-now-covers-elder-abusers/> [https://perma.cc/5LAJ-YDYB]; H.R. 1760, 2023–2024 Gen. Assemb., Reg. Sess. (Pa. 2023).

of the slayer rule to apply to perpetrators of EFA.¹¹⁸ From ten U.S. jurisdictions with elder abuse disinheritance provisions, the laws can be generally categorized according to their limitations and outcomes.¹¹⁹ To accurately assess the lessons that can be learned from the U.S. experience, it is necessary to better understand how each model operates, and whether its limitations effectively achieve their designed purpose. Currently, there is limited data that captures the effectiveness of these laws; whether they are relied on in legal practice to address abuse; if there are barriers that prevent victims from accessing the legal remedy; and how they operate within the broader succession law and legal ecosystems. Further, there is an absence of data that documents the issues considered by each U.S. state's lawmakers when drafting and passing disinheritance laws. If Australian jurisdictions are to learn from the U.S. experience so that it may inform responsible, evidenced-based reform of its own forfeiture rule, these gaps will need to be explored and filled.

A key limiting feature of the U.S. models is the necessity of a qualifying conviction for EFA. In seven states, a criminal conviction is a necessary threshold that must be crossed before filing a disinheritance claim.¹²⁰ By contrast, disinheritance laws in Washington and California provide that in the absence of a criminal conviction, the court may determine to a civil standard whether a person has perpetrated abuse for the purpose of disinheritance.¹²¹ By mandating a qualifying conviction, legislatures place a significant barrier to accessing justice through

118. See Hunt, *supra* note 114, at 463 (placing U.S. slayer statutes into three different categories, each ineffective in their own way).

119. See *supra* note 15; Hunt, *supra* note 114, at 446; see also Piel, *supra* note 16, at 371.

120. ARIZ. REV. STAT. ANN. § 46-456 (2024); KY. REV. STAT. ANN. § 381.280 (West 2024); MD. CODE ANN., CRIM. LAW § 8-801(e) (West 2024); MICH. COMP. LAWS § 700.2803 (2024); OR. REV. STAT. § 112.455 (2024); 20 PA. CONS. STAT. §§ 2106, 2507 (2024). In Illinois, the person must either be criminally convicted or found civilly liable. 755 ILL. COMP. STAT. 5/2-6.6 (2024).

121. WASH. REV. CODE § 41.04.273(6)(b) (2024); CAL. PROB. CODE § 259(a)(1) (West 2024). The remaining state, Florida, provides that where there is no qualifying conviction, the court may “determine by the greater weight of the evidence whether the decedent’s or other person’s death was caused by or contributed to by the abuser’s . . . conduct.” FLA. STAT. § 732.8031(1)(b) (2024).

disinheritance laws, imposing a higher criminal standard of proof for a civil probate action.¹²² Further, it relies on law enforcement and the state to pursue criminal allegations of elder abuse, removing control from the estate. Proponents of the conviction requirement assert that it is necessary to ensure the disinheritance provision is not weaponized by beneficiaries who stand to benefit from making meritless claims of abuse.¹²³ However, there is no data that captures whether this severe threshold requirement does eliminate frivolous claims. Do courts in Washington and California, which apply a civil standard of proof, experience a high volume of vexatious claims regarding elder abuse disinheritance laws? The qualifying conviction is of particular interest in Australia, where elder-specific criminal laws do not exist.¹²⁴ Can jurisdictions without elder abuse offense provisions still adopt effective disinheritance laws? Is a qualifying conviction necessary, or can disinheritance be established without it?

Another notable type of restriction imposed on elder abuse disinheritance laws is limiting its application to EFA to the exclusion of all other sub-types of abuse.¹²⁵ This is most aptly illustrated by Washington's disinheritance law, which is triggered only when a person participates in the "willful and unlawful financial exploitation of a vulnerable adult."¹²⁶ This may include improperly using or withholding property, income or financial sources and/or breaching a fiduciary duty.¹²⁷ Without the requirement of a conviction, allegations of financial abuse in Washington need only satisfy the court to a "clear, cogent and convincing" standard.¹²⁸ Critics of this limitation argue

122. Hunt, *supra* note 114, at 464–65.

123. *Id.* at 465.

124. AUSTL. L. REFORM COMM'N, *supra* note 1, at 280–81. Since the ALRC report, the Australian Capital Territory has become the only jurisdiction in Australia to adopt an elder abuse discrete offense. *See Crimes Act 1900* (ACT) s 36A(1) (Austl.) (criminalizing acts against "vulnerable persons").

125. Hunt, *supra* note 114, at 466.

126. WASH. REV. CODE §§ 11.84.020, 11.84.010(1) (2024).

127. § 74.34.020(7).

128. Hunt, *supra* note 114, at 467.

that it fails to understand the relationship between sub-types of elder abuse, particularly financial and physical, and fails to take full advantage of the novel solution's powerful expressive and deterrent functions.¹²⁹ Under the Washington-model law, physical or sexual abuse of an older person does not warrant disinheritance, while financial exploitation attracts a severe penalty.¹³⁰ The counter-argument lies in the law's original impetus.¹³¹ When introduced in 2009, the law was expressly designed to reduce the prevalence of EFA, provide a civil remedy where criminal charges were difficult to prosecute once the victim had died, and encourage the reporting of abuse.¹³² Those who support limiting the law to financial abuse believe that the state's criminal laws, including homicide and vulnerable protection statutes, are better designed to deter other sub-types of elder abuse.¹³³ Since the law was enacted fifteen years ago, what is the experience of the Washington legal community? Is physical elder abuse going unremedied? Are there instances where a disinheritance law that applied to a broad range of elder abuse sub-types would have resulted in greater justice for an older person?

Finally, in Oregon, a time limit is imposed for disinheritance laws to be triggered following the conviction for abuse.¹³⁴ Unlike slayer situations, where elder abuse has occurred, the older person is generally still alive following the wrongful act(s) and arguably can exercise their testamentary freedom and alter their estate plan to reflect the abusive behavior.¹³⁵ Laws in Oregon stipulate that disinheritance rules only apply where the

129. *Id.* at 468.

130. *See* § 11.84.010 (linking the definition of "decendent," under the slayer statute to "financial exploitation" as defined in § 74.34.020(7)).

131. *See* Piel, *supra* note 16, at 370 (discussing original drive for the bill).

132. *Id.*; COURTNEY BARNES & LARA ZAROWSKY, WASH. STATE JUDICIARY COMM., BILL ANALYSIS: AN ACT RELATING TO THE ESTATES OF VULNERABLE ADULTS, H.R. 61-1103, Reg. Sess., at 1 (2009).

133. *See* Piel, *supra* note 16, at 371; WASH. REV. CODE §§ 9A.32.010, 74.34.020(7) (2024).

134. OR. REV. STAT. § 112.457 (2024).

135. Korpup, *supra* note 114, at 569 (describing the traditional rationale of "unworthy heir" statutes).

decendent dies within five years after the abuser is convicted of a felony that constitutes physical or financial abuse.¹³⁶ This time limit arguably allows a victim testator to ratify the abusive behavior and/or express their true testamentary intention and autonomy by altering their estate plan.¹³⁷ However, this argument in support of testamentary freedom fails to consider circumstances where the older person does not have requisite testamentary capacity, or the mental and emotional impact EFA can have on victims.¹³⁸ Ultimately, does this limitation reflect the genuine testamentary intention and respect for an older person's autonomy and self-determination? Alternatively, does it unjustly extinguish claims with merit?

IV. WHAT'S NEXT?

The U.S. expanded slayer rule has appeared on the Australian legal radar, sparking varying degrees of interest within the local legal community.¹³⁹ In its 2017 report, the ALRC acknowledged the U.S. disinheritance laws but ultimately rejected recommending the adoption of similar laws by Australian jurisdictions.¹⁴⁰ While some public stakeholder submissions indicated disinheritance laws warranted further exploration,¹⁴¹ the ALRC identified two major barriers in applying the U.S. approach in

136. § 112.457.

137. See Linda K. Kisabeth, *Slayer Statutes and Elder Abuse: Good Intentions, Right Results? Does Michigan's Amended Slayer Statute Do Enough to Protect the Elderly?*, 26 QUINNIPIAC PROB. L.J. 373, 396 (2013) (noting that an abuser can still collect under such circumstances); Anne-Marie Rhodes, *Consequences of Heirs' Misconduct: Moving from Rules to Discretion*, 33 OHIO N.U. L. REV. 975, 986–87 (2007).

138. Mary Elizabeth Morey, Note, *Unworthy Heirs: The Slayer Rule and Beyond*, 109 KY. L.J. 787, 797 (2020); Korpus, *supra* note 114, at 542.

139. AUSTL. L. REFORM COMM'N, *supra* note 1, at 279–80; S. AUSTL. L. REFORM INST., *supra* note 99, at 250–54; Mikaylie Page, “Public Trustee (WA) v Mack”: *An Uncertain Future for the Forfeiture Rule in Elder Abuse Cases?*, 18 MACQUARIE L.J. 137, 141 (2018); Hamilton, *supra* note 20, at 4, 6.

140. AUSTL. L. REFORM COMM'N, *supra* note 1, at 279–81.

141. See Letter from Damon Quinn, CEO, NSW Tr. & Guardian, to Sabina Wynn, Exec. Dir., Austl. L. Reform Comm'n 10 (Aug. 18, 2016) [hereinafter Letter from NSW Tr. & Guardian]; L. COUNCIL OF AUSTL., AUSTRALIAN LAW REFORM COMMISSION ELDER ABUSE DISCUSSION PAPER 9 (2017).

an Australian context. First, unlike the U.S., most Australian states do not have elder-abuse-specific offenses,¹⁴² which are often necessary to access the expanded slayer rule. Second, any disinheritance laws would need to be considered within “the wider context of succession law.”¹⁴³ While both observations are legitimate, further critical exploration of how the various U.S. laws operate may offer answers to potentially assuage these concerns. As demonstrated by laws in Washington and California, a qualifying conviction may not be necessary to access disinheritance laws for EFA offenders.¹⁴⁴ Rather, the court can be satisfied that financial abuse occurred “by clear, cogent, and convincing evidence.”¹⁴⁵ However, does this reduced evidentiary requirement operate effectively and negate the requirement for elder-abuse-specific offenses? For guidance on assessing how disinheritance of EFA perpetrators would operate in the wider context of succession laws in Australia, it is helpful to look at the forfeiture rule’s current operation.¹⁴⁶ Expanding the rule’s scope, like the U.S. model, would allow it to continue operating to bar offenders from applying for a provision from the estate through a FPA. Amending the forfeiture rule would only seek to change who it applies to (killers and perpetrators of elder abuse), not the rule’s effect.

142. Since the ALRC report, the Australian Capital Territory has become the only jurisdiction in Australia to adopt an elder abuse discrete offense. See *Crimes Act 1900* (ACT) s 36A(1) (Austl.).

143. AUSTRALIAN L. REFORM COMM’N, *supra* note 1, at 281.

144. WASH. REV. CODE § 41.04.273(6)(b) (2024); CAL. PROB. CODE § 259(a)(1) (West 2024).

145. § 41.04.273(6)(b); see also PROB. § 259(a)(1) (using a “clear and convincing” standard).

146. Mackie, *supra* note 99, at 117; Samantha Hepburn, *Equity and the Modern Forfeiture Rule*, 94 AUSTRALIAN L.J. 186, 186 (2020); Andrew Hemming, *Killing the Goose and Keeping the Golden Nest Egg*, 8 QUEENSLAND U. TECH. L. & JUST. J. 342, 356 (2008) (arguing that the fatal flaw of international slayer statutes has been their inconsistent consideration of the totality of the circumstances, which ultimately favors wrongdoers); Page, *supra* note 139; VICTORIA L. REFORM COMM’N, *supra* note 99, at 10, 50 (describing future legal options and the current rule); S. AUSTRALIAN L. REFORM INST., *supra* note 99, at 8–10 (discussing current forfeiture rule in Australia).

While there is an appetite in Australia to explore innovative legal solutions to the escalating EFA problem,¹⁴⁷ critics of the U.S. model argue that although disinheritance laws have merit, it "is a step too far . . . and requires careful examination."¹⁴⁸ However, given the increasing prevalence of EFA and the severe consequences it can have on an older person, a bold response is necessary and highlights the need to explore and understand the laws in greater depth. Any reform of the forfeiture rule in Australia must be driven by robust, rigorous empirical data. Also, the introduction of any new laws pertaining to target EFA must be viewed through a rights-based lens, focused on the autonomy, dignity and safeguarding of older people. This is not a framework commonly applied to elder abuse disinheritance laws in the United States. What impact does the disinheritance of perpetrators have on the autonomy and testamentary freedom of the older person? As this Essay has identified, there is also no available data which canvasses the experience of the U.S. legal community who interacts with elder abuse disinheritance laws and those tasked with applying the law to real-life cases.

To fill the data gap and help drive elder law reform, further research is needed, including a study which provides a front-line insight into the impact and operation of U.S. disinheritance laws for perpetrators of elder abuse. Semi-structured interviews with attorneys practicing in estate law, judicial officers, and lawmakers in states with disinheritance laws would capture the reality of how these novel laws operate and potentially identify how they could be improved. From the lived experience of attorneys, does a qualifying conviction unjustly limit the number of claimants? How is an act of elder abuse and/or EFA legally defined, and does it accurately reflect the cases that are being

147. In its submissions to the Australian Law Reform Committee, the New South Wales Trustee & Guardian and The Law Council suggested that the introduction of a U.S.-modeled disinheritance law for elder abusers was "worthy of investigation and evaluation." AUSTL. L. REFORM COMM'N, *supra* note 1, at 280; see Letter from NSW Tr. & Guardian, *supra* note 141, at 10; L. COUNCIL OF AUSTL., *supra* note 141, at 9.

148. S. AUSTL. L. REFORM INST., *supra* note 99, at 254.

presented to lawyers? From the perspective of those who design the laws, why are they limited to instances of EFA? Were there any other limitations that were considered but ultimately not included in the legislation?

The answers to these questions, triangulated with a comprehensive doctrinal analysis of cases where perpetrators have been disinherited, viewed through a human rights lens, would help to inform the drafting and adoption of a disinheritance law in Australian jurisdictions. Not only would it allow for a better understanding of the laws, but it would also illustrate how succession law can be used as a legal tool to combat elder abuse. The data captured by a qualitative study of this nature would be beneficial to Australian and U.S. policy crafters, lawmakers, the legal community and law reform agencies. Given the similarities of the legal systems, there is a history of both countries drawing inspiration from each other to create responsible law reform, particularly in the area of succession law.¹⁴⁹ By undertaking this research agenda, in the spirit of collaboration and cooperation, it will allow for the sharing of knowledge to improve outcomes for older people, better understand the complexities of EFA, and produce informed, relevant, and responsible legal solutions.

CONCLUSION

The complexity and ubiquitous nature of EFA requires legal remedies that defy convention. Given the global nature of the issue, there is an opportunity to look beyond domestic borders to consider how similar international jurisdictions respond to this problem. Addressing this critical human rights and socioeconomic injustice requires a holistic approach that stretches beyond the legal discipline. However, how the law responds to EFA is critical to safeguarding against abuse and promoting respect for the dignity, security, and autonomy of older people.

149. Bridget J. Crawford, Kelly Purser & Tina Cockburn, *Wills Formalities in a Post-Pandemic World: A Research Agenda*, 2021 U. CHI. LEGAL F. 93, 95 (2021).

While law reform bodies in Australia may argue that existing legal strategies which respond to abuse should be evaluated before adopting a U.S. model of disinheritance,¹⁵⁰ this position has largely resulted in legislative inaction, with EFA law reform “moving at a glacial pace.”¹⁵¹ Given the increasing threat of EFA and its impact on victims, it is time to further explore and understand how succession law, through disinheritance, could be a powerful tool in combating EFA. If Australia is to look to the U.S. as an example of how this can be achieved, it must first understand how the U.S. model laws function before considering how they might be adapted to work synergistically within the existing succession law structure.

For Aviva Cohen, any succession law reform will be too late. In 2016, the New South Wales Supreme Court ordered Shalom Cohen to transfer the Lane Cove property back to Aviva, finding that the original transaction was unconscionable and a breach of the fiduciary duty he owed to his mother as her attorney.¹⁵² While it is likely the New South Wales Trustee then sold the property to pay Aviva’s aged care debt and apply the funds for her benefit, Shalom Cohen was her only surviving beneficiary.¹⁵³ In January 2019, Aviva died aged ninety-five years old, three years after the New South Wales Supreme Court decision.¹⁵⁴ Shalom Cohen filed a Notice of Intention to Apply for Probate on a 1974 will executed by Aviva, ultimately appointing him as her executor and sole beneficiary.¹⁵⁵ Depending on how much of the Lane Cove sale proceeds Aviva spent in her final three years, Shalom Cohen stands to benefit from the estate, which he financially abused and sought to deprive of its

150. S. AUSTL.L. REFORM INST., *supra* note 99, at 254.

151. Anna Kelsey-Sugg & Nat Tencic, *Elder Abuse Reports Are Rising. Age Discrimination Commissioner Says the Government Must Do More*, ABC NEWS (July 4, 2023, 3:00 PM), <https://www.abc.net.au/news/2023-07-05/elder-abuse-rising-reports-need-addressing-says-kay-patterson/102510538> [<https://perma.cc/Y4LG-ZURF>].

152. *Cohen v Cohen* [2016] NSWSC 336, ¶¶ 66, 70, 73 (Austl.).

153. *Id.* ¶¶ 30, 50.

154. Notice of Intended Application for Probate, Estate of Aviva Cohen, NSW S. Ct. (Sept. 4, 2023) (No. 2023/00281417).

155. *See id.*

only asset to the detriment of the testator. If Australia had a disinheritance law for perpetrators of EFA, like the United States, Shalom Cohen's wrongdoing would be publicly sanctioned, and he would likely not benefit from his mother's estate.