

Identifying and Addressing Undue Influence in Elder Abuse Cases

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- Written materials and a recording will be available at NCLER.acl.gov. See also the chat box for this web address.

About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

About ABA COLA

The ABA Commission on Law and Aging is a collaborative and interdisciplinary leader of the American Bar Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons.

The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

Financial Exploitation & Impact

Aging Population

- It is estimated that about 6.5 million Americans presently live with Alzheimer's
- The population of Americans age 65 and older is projected to reach 88 million by 2050
- This group is identified as being at the greatest risk of suffering from cognitive impairments

High Achievers & Financial Exploitation

- “High achievers are great targets for elder financial abusers because they can mask dementia and their egos won’t allow them to admit they have it.”
 - Ted Knutson, April 29, 2020, [High Achievers Vulnerable to Elder Financial Abuse Because They Can Mask Dementia, Their Egos Says Expert.](#) *Id.*
- High achievers can also fall victim as a result of a shift in the power paradigm.

Prevalence of Elder Abuse

- The National Council on Aging reports that:
 - Approximately 1 in 10 Americans aged 60+ have experienced some form of elder abuse.
 - One study estimated that only 1 in 14 cases of abuse are reported to authorities.
 - In almost 60% of elder abuse and neglect incidents, the perpetrator is a family member. Two thirds of perpetrators are adult children or spouses.
 - Recent studies show that nearly half of those with dementia experienced abuse or neglect.

True Link Report on Financial Elder Abuse

- A 2015 True Link Report on Elder Financial Abuse placed losses experienced by the elderly, as a result of all forms of elder financial abuse, at a staggering \$36.48 billion per year.
 - The 2015 True Link Report on Elder Financial Abuse also reported that an estimated 954,000 seniors were skipping meals as a result of financial abuse.
- The results of these studies should set off alarm bells.

Increased Mortality Risk

- According to a 5 year all cause mortality rate study conducted across five categories of substantiated elder abuse (which included caregiver neglect, physical abuse, emotional abuse, financial exploitation, and poly-victimization), caregiver neglect and financial exploitation of the elderly had the lowest survival rates.
 - [Link to publication](#)
- “A single episode of victimization can ‘tip over’ an otherwise productive, self-sufficient older person's life.”
 - [Clinical and Medical Forensics of Elder Abuse and Neglect](#)

Crime of the 21st Century

- Elder abuse has been called the “crime of the 21st century.”
- Elder financial abuse is just one form of such abuse.
- This form of abuse represents “a misappropriation or abuse of financial control in a relationship where there is an expectation of trust, resulting in harm to the elderly” or vulnerable victim.
- Undue influence is a tool used in financial elder abuse.

Financial Exploitation

- The Prosecutors' Resource on Elder Abuse defines financial exploitation to include:
 - acts or a taking for which the victim is unable to give legal consent or of which the victim is unaware;
 - abuse of a fiduciary relationship;
 - situations in which a victim's consent is the result of fraud or deceit, coercion, threats or violence, manipulation, subterfuge, duress, or undue influence;
 - financial exploitation typically includes a process consisting of a series of events rather than a single incident.
- [The Prosecutors' Resource](#), *Id*, at p. 6.

More Than Financial Loss

- Financial exploitation is the most common form of elder abuse, but the concern isn't just about the financial loss.
 - [F]or some, victimization can be the “tipping point” that pushes the victim into poorer health.
 - The victim's quality of life “can be jeopardized [by] declining functional abilities, progressive dependency, a sense of helplessness, social isolation, and a cycle of worsening stress and psychological decline.”
 - [The Prosecutors' Resource](#), *supra* at p. 6.

Scams & Financial Abuse

- “...More than 200,000 scams and financial abuse cases targeting the elderly are reported to authorities every year, and most experts agree that’s just the tip of the iceberg.”
- Estimates “show \$1.17 billion in damages are reported to authorities, but the real figure likely dwarfs that amount when factoring in unreported elder fraud.”
 - Paul Bischoff, [The United States of Elder Fraud: How Prevalent Is Elder Financial Abuse in Each State?](#) Comparitech (Apr. 17, 2019)

Undue Influence

Role of Professionals

- Attorneys and other professionals often find themselves on the front line of identifying and dealing with issues relating to financial abuse.
- Being able to identify indicia of undue influence or other forms of financial abuse can be critical to the delivery of competent advice, representation, and assistance.

FINRA Defines Financial Exploitation

- FINRA Rule 2165 defines financial exploitation as:
 - A. the wrongful or unauthorized taking, withholding, appropriation, or use of a Specified Adult's funds or securities; or
 - B. any act or omission by a person, including through the use of a power of attorney, guardianship, or any other authority regarding a Specified Adult, to:
 - i. obtain control, through deception, intimidation or undue influence, over the Specified Adult's money, assets, or property; or
 - ii. convert the Specified Adult's money, assets, or property.

FINRA (Cont.)

- FINRA, therefore, explicitly recognizes that even a person imbued with the power to transact business with regard to a client's account may be engaged in financial exploitation.
- When there is a reasonable basis to suspect that financial exploitation is taking place, the broker may freeze the account on a temporary basis and alert others so that additional action to protect the client may take place.

2018 Consumer Protection Act (1 of 2)

- The 2018 Economic Growth, Regulatory Relief, and Consumer Protection Act included a provision entitled “Immunity from Suit for Disclosure of Financial Exploitation of Senior Citizens.”
- This provision essentially provides immunity from civil or administrative proceedings to trained individuals who are employed in supervisory, compliance, or legal roles (at credit unions, depository institutions, investment advisors, broker dealers, insurance companies, and transfer agencies) for disclosures made in good faith and with reasonable care relative to suspected financial exploitation of an older adult.

2018 Consumer Protection Act (2 of 2)

- The act requires training in a number of areas, including but not limited to common signs that financial exploitation of an older adult may be occurring.
- The act does not mandate reporting
 - nor does it set forth the action to take when financial abuse is reasonably suspected
- It may facilitate protective action by eliminating concerns that reporting might be considered a breach of a financial institution's obligation to keep a client's information confidential when disclosure is required to address the suspected financial exploitation of older adults.

Psychology of Persuasion

- The ABA book, *Undue Influence and Vulnerable Adults*, addressed a recent study on the psychology of persuasion.
 - That study identified several categories of tactics that persuaders may employ to effect undue influence for financial gain. Among the tactics identified, generally applicable to estate planning situations, were:
 - Reciprocity;
 - Commitment and consistency;
 - Authority; and,
 - Creation of or taking advantage of “false memories”.
- Glazier, Dixon & Sweeney, *Undue Influence and Vulnerable Adults*, ABA 2020. Id. at 371-380 (citing the psychological study by Robert B. Cialdini, *Influence: The Psychology of Persuasion*).

Reciprocity

- The “reciprocity” principle entails creating a debt of gratitude.
- While courts are reticent to apply this principle in family dynamics, it has been found that “[i]f kindness and affection result in overcoming the testator’s free agency and leave the will that of the beneficiary rather than the testator, then such constitutes undue influence.”

Kelley v. First State Bank of Princeton, 81 Ill. App. 3rd 402, 414 (Ill. App. Ct. 1980), 401 N.E.2d 247, 256 (1980).

Commitment and Consistency (1 of 2)

- When the “commitment and consistency” process is used, persuaders exploit the internal and interpersonal pressures often felt by individuals to justify and stand by decisions once made.
- Here, the persuader makes it easy for the victim to make a commitment.
- This tactic can be successful even with persons described as “strong-willed” or “stubborn.” Once such individuals make a commitment, they tend to stick to it.

Campisi, *Undue Influence*, *supra* note 37, at 373, 374.

Commitment and Consistency (2 of 2)

- Therefore, after the commitment that benefits the persuader is made, the victim is encouraged to follow through.
- In addition, by using this process, a “stubborn” individual may be persuaded to adopt negative perceptions of others and the belief that others are undeserving of an inheritance.
- Once the victim incorporates such beliefs as “facts,” the “commitment and consistency” principle can make it difficult to overcome such perceptions and convince the victim that the contrary may be true.

Campisi, *Undue Influence*, supra note 37, at 373, 374.

Authority (1 of 2)

- Most people have a respect for authority and a disinclination to defy authority.
- When the “authority” process is used, the persuader attempts to clothe himself with the trappings of authority or to recruit others
 - Including professionals, to aid and abet the persuader, whose authority (on its own or by such affiliation) benefits the persuader’s efforts for financial gain.
 - This process abuses the perception of authority, whether that perception is created by title, education, or attire.

Authority (2 of 2)

- In the context of the estate planner:
 - The persuader “will often take steps to place himself in control of the testator’s finances or estate plan and then represent to the testator that he must sign off on modification or transactions because they are necessary”
 - This process abuses the trust that the victim has placed in others.

Id. at 377, 378

False Memories

- False memories can be induced by repetitive efforts of a persuader to reframe the older adult's relationship with family members or other previously favored individuals or institutions.

Id. at 367, 368.

Diminished Capacity

- Issues of diminished capacity are often raised in undue influence cases.
- This may be because:
 - Undue influence may often be found when there are vulnerabilities, isolation, and dependency.
 - The issue of capacity is often open to question and interpretation in these cases.
 - Reduced cognition may be a factor in many of these cases.
 - However, one must be competent for undue influence to exist.

What is Undue Influence?

- At the most basic level, undue influence is persuasion that abuses a relationship.
- It can apply to any form of estate planning or financial transaction.
- Influence that destroys free agency and supplants one's will with that of another.

Not All Influence is Undue

- Even specific and direct requests by a beneficiary may not constitute undue influence.
 - This is true even though the benefit wouldn't have been provided but for the request of the beneficiary.
- Even when many suspicious circumstances surrounding a transaction do exist, it's still possible that the plan represents the free will and desire of the individual

The Presumption of Undue Influence

- It's an evidentiary or statutory mechanism intended to level the playing field.
 - If met, it shifts the burden of production to the proponent of an instrument.
 - If present, it may permit a challenger to withstand a dispositive motion.
 - The elements vary from state to state, but consistently require proof of the existence of a fiduciary or confidential relationship.
 - It's helpful for attorneys to know what the elements of the presumption entail, so that additional measures can be utilized when those elements are present.

Resources to Assist in Identifying “Red Flags” Or “Indicia” Of Undue Influence

- Psychogeriatric Association’s International Task Force Report
- Restatement of Property, Third
- ABA/APA Interdisciplinary Task Force handbooks for (1) Psychologists, (2) Attorneys, and (3) Judges
- [Undue Influence and Vulnerable Adults](#), published by the ABA
- Psychogeriatric experts
- Marketed sources include the following models, such as:
 - IDEAL, Cult Model, SCAM, SODR, and the Undue Influence Wheel

Other Resources

- [California Undue Influence Screening Tool \(CUIST\)](#)
 - created in California as part of the Borchard Foundation Study
- A tool developed by the New York City Elder Abuse Center, called the Interview for Decisional Abilities
- Financial Capacity Instrument tests developed by Marson, et al , in 2000
- Project MASTER's [Undue Influence Training Module](#) from San Diego State University
- Weill Cornell Medicine [IDA Practitioner](#)

Suspicious Circumstances (1 of 2)

- Mental inequality
- Acute care settings
- Living with or dependence upon an abusive person
- Active procurement
- Events occurring in haste, at abnormal times or places
- Family conflict
- Sexual bargaining
- Playing on fear of abandonment or changed living situations

Suspicious Circumstances (2 of 2)

- Shift in the Power Equation
- Sleep Deprivation
- Changes in Attitudes
- Secrecy Concerning the Transactions
- Recent Bereavement
- Unnatural Terms
- Purported Influencer Becomes a Fiduciary
- For Holocaust survivors – threats of cremation

Undue Influence Cases Are Extremely Fact-Specific

- The existence of a myriad of suspicious circumstances can sometimes be undercut by just a single mitigating factor.
- It's the quality, not the quantity, of evidence that counts when weighing mitigating factors against suspicious circumstances.

Proactive Strategies

It's Important For Lawyers and Other Professionals To Exercise Independent Judgment

- It's an important mitigating factor.
- The efforts can be very important to preserving the integrity of the plan.
- Make and retain detailed notes and pay attention to the details and observations.
- Failure to exercise independent judgment may undercut enforceability of an instrument when undue influence is at issue.
- It helps in avoiding vicarious liability.

Meet with the Client Alone

- Be sure to meet with clients alone when attempting to ascertain their desires and the rationale behind them and document your observations;
- Don't be afraid to slow the process down if you have concerns;
- Be alert to changes in the client's supporting "team" (e.g. financial advisors, accountants, attorneys, for no readily apparent reason) or deviations from historical plans.
 - Financial advisors might inquire why an additional party is being added as a joint tenant to an account and let the client know that there are other options which might provide greater protections for the client.

Medical Conditions and Dementia

- Some medical conditions may make an individual more dependent or susceptible to undue influence.
- A diagnosis of dementia isn't necessarily determinative of capacity, but it may indicate that the individual might be more at risk.
- Many of the assessments performed by medical providers are neurological as opposed to cognitive in nature.

Things to Consider When Creating Documents

- Consider professional assessment if deemed appropriate
- Be attentive to and document assessments relative to capacity, vulnerabilities, and suspicious circumstances
- Ask questions in the witnesses presence that establish elements of testamentary capacity
- Send documents to client in advance for review
- Question client for rationale behind changes
- Engage client in a dialogue at time of execution, in presence of witnesses, as to the intent of the document
- Ask questions in the witnesses presence that establish elements of testamentary capacity
- Consider asking the witnesses for memos
- If concerned about future power shifts, consider including a corporate or independent fiduciary as a lifetime co-trustee or Trust Protector, who must approve any future amendment
- Don't take short cuts

What Can We Learn From FINRA?

- Under the FINRA rules there is:
 - A requirement to obtain the name of a trusted other;
 - Recognition that the person named by the client or person holding the power to transact business on behalf of the client may be engaged in financial exploitation of the client;
 - The ability to take action and freeze a transaction or client's account for 15 business days and alert others so that additional action to protect the client might be initiated when there is a reasonable basis to suspect that financial exploitation is taking place.
- Consider obtaining written authorization and steps to take from the client when they are competent to provide this information, as it will be helpful to have their directions should concerns arise down the road.

Additional Proactive Actions

- Ulysses Clauses:
 - Can be used in advance directive to instruct treatment providers of instructions that should be ignored during periods of incapacity;
 - Can be used to restrict amendments and withdrawals when specified situations occur;
- Consider use of credit card and bank alerts for unusual transactions or a program like [EverSafe](#) to analyze financial behavior and alert to unusual financial transactions or behavior.
- TrueLink and other companies may allow for a customized debit card limit on withdrawals and prohibit online and international transactions.
- Maintain a strong team that regularly interacts and evaluates client's financial situation and plan.

If You Suspect Undue Influence

- Don't be afraid to exercise independent judgment – it can be extremely important.
- Make and retain detailed notes and pay attention to the details and observations.
- Consider a professional assessment if deemed appropriate and the client is willing.
- Meet with the client outside the presence of any beneficiary or caregiver (if possible).
- Don't take short cuts.
- Slow the process down and pay attention to (in)consistencies regarding the client's desires, rationale and directions.

Key Lessons

- Undue influence often occurs in secret, over a period of time, and abuses relationships of trust.
- Understanding the “red flags” or “indicia” of undue influence can help protect individuals from its effects.
- Proactive planning, preparation of notes regarding observations, and record keeping are important.
- Understanding the elements of the presumption can help to protect an individual’s desires.
- Knowing the options available to address suspicious circumstances and concerns can be invaluable.

Walk Through a Case

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