

# Litigating Financial Exploitation Cases in State Courts

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## About the Author

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## Introduction

People are living longer. The population of persons over 70 is growing dramatically,<sup>1</sup> and attending that population growth has been an explosion of persons experiencing age-related cognitive impairments.<sup>2</sup> As a result, the financial exploitation of vulnerable adults is epidemic.

Laws regarding protection of older adults are steeped in old concepts of capacity. Courts and the laws are evolving to catch up with these changes, and the attending cases that are coming before them. Notwithstanding sincere efforts, the procedures and remedies available remain imperfect.

This Issue Brief will exclusively reference Michigan law, as the author practices in Michigan. The author assumes that comparable rules, language and procedures exist in the courts of other states and that counsel in those other states will understand how those concepts apply in their jurisdictions. This Issue Brief is about civil processes, and will not address criminal remedies.

## Evaluating Legal Merits of Financial Exploitation Cases

Evaluating the legal merits of these cases when they come in is challenging. Typically, the person seeking representation is not the person who has been exploited. More commonly, the exploited person is deceased or has a cognitive difficulty that impairs their ability to speak for themselves. As a result, the story comes to the attorney from someone related to the older adult,<sup>3</sup> and as such, is enmeshed with emotions, and often family dynamics. Imagine these cases like a still photograph of two hands moving toward each other, one containing a pile of cash, the other reaching for it. The question then is whether this is an image of a gift or a grab. The only party to the transaction now able to testify will claim it was a gift of a competent adult, or consideration for some service or property. Proving it was not requires going backwards in time and establishing sufficient evidence to overcome that testimony. With few exceptions, the burden is always on the party contesting the validity of a transaction.

There are always two sides to every case and clients frequently only present one side. For example, whether a

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1 2016 Profile of Older Americans, Administration on Community Living, [acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2016-Profile.pdf](https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2016-Profile.pdf).

2 Nearly 1 in 10 older adults has difficulty, *Id.* at 14.

3 Hereinafter “older adult” refers to the individual vulnerable to financial exploitation.

child caring for an older adult was a bad person who took advantage of them while they declined, or that child was the only child that cared about them, are often two sides of the same story. Proving that the older adult did not understand what they were doing, and did not desire to disproportionately benefit the child who was providing for their needs, is rarely as easy as the child who was left out would like to believe.

## Vulnerability and age-related cognitive impairment

It is impossible to work in this arena without becoming sophisticated in the processes of age-related cognitive decline.

Our society and our legal system are only beginning to digest the impact of age-related cognitive impairment. The initial understanding is influenced by the most recognizable characteristics of that process, specifically short-term memory loss associated with Alzheimer's disease.<sup>4</sup> Age-related cognitive decline is much more complicated. A variety of diseases and conditions can impair an older person's ability to exercise judgment. These conditions include: Alzheimer's disease, Parkinson's disease, Lewy Body Dementia, alcohol-related dementia, and frontal-lobe dementia.<sup>5</sup>

Obtaining medical records is a key in many cases. Ideally, a sophisticated analysis of that person's cognitive abilities will have been completed at a time relatively contemporaneous with the transaction at issue. Unfortunately, while routine cognitive tests are common, such as the Mini-Mental State Exam, serious geriatric psychiatric evaluations are infrequently available. As a result, it is often necessary in these cases to retain an expert who can evaluate the evidence after-the-fact and opine on the abilities of the older adult at the time of the contested transaction.

## Vulnerability apart of cognitive impairment

The difference between incapacity and vulnerability are important distinctions to understand. While cognitive limitations are frequently in play in these cases, older adults often become vulnerable to exploitation because of conditions unrelated to their mind or memory. Factors that contribute to vulnerability that may exist with or without cognitive impairment include: social isolation, lack of self-worth, loss, and dependency on others.

These cases are particularly difficult to argue because courts prefer to defer to medical evidence and to give unjustified weight to such evidence. Important research is still developing on this cutting edge issue in financial exploitation litigation.<sup>6</sup>

## Common Causes of Action

There are several causes of action commonly raised in financial exploitation cases. This list starts with the most common causes of actions and works in order of descending frequency:

### 1. Lack of capacity

A person must have capacity to contract, execute a deed, create a will, create a trust, create an agency (power of attorney) or make a gift. The standards for capacity may differ depending on the nature of the transaction. Some standards are established by statute, others by case law.<sup>7</sup>

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4 Emory University, Alzheimer's Disease Research Center, Cognitive Skills and Normal Aging, [alzheimers.emory.edu/healthy\\_aging/cognitive-skills-normal-aging.html](http://alzheimers.emory.edu/healthy_aging/cognitive-skills-normal-aging.html).

5 Mayo Clinic, Dementia: Symptoms and Causes, [mayoclinic.org/diseases-conditions/dementia/symptoms-causes/syc-20352013](http://mayoclinic.org/diseases-conditions/dementia/symptoms-causes/syc-20352013).

6 See research by Dr. Peter Lichtenberg at Wayne State University for more information: [mpsi.wayne.edu/profile/aa2275](http://mpsi.wayne.edu/profile/aa2275).

7 The Department of Justice has a guide to state statutes on financial exploitation, which include some guidance on state capacity standards. See: U.S. Department of Justice, Elder Rights Initiative, [justice.gov/elderjustice/prosecutors/statutes](http://justice.gov/elderjustice/prosecutors/statutes).

## 2. Undue Influence

A document can be set aside where one party's control over the other party was such that the free will of the victim was overwhelmed by the perpetrator. In Michigan, a presumption of undue influence can arise when: (1) the perpetrator stood in a fiduciary relationship with the victim, (2) had the opportunity to influence the victim, and (3) benefited from the transaction.<sup>8</sup>

## 3. Breach of fiduciary duty

If a person places their trust in another, the person in whom the trust is placed assumes a fiduciary duty not to use their position of trust for their personal benefit. Fiduciary relationships can be formally established, or may exist simply as a function of how the parties conducted themselves. Breach of fiduciary relationship is defined statutorily for formal relationships, including Trustee, executor, guardian or conservator; and by common law in less formal relationships. In some instances, the fiduciary duties of an agent under a power of attorney may be described in statute.<sup>9</sup>

## 4. Conversion

Conversion or embezzlement are common law causes of action, often statutorily memorialized in state law. Conversion is a wrongful act with respect to the property of another. Commonly, conversion can allow for statutory damages.<sup>10</sup>

## 5. Constructive trust

Constructive trust is an equitable remedy but commonly pled as a cause of action. It asserts that property owned by one person should in fact be held for the benefit of another. Equity can be a powerful tool in these cases, and is underutilized by most litigators.

## 6. Oral trust

An oral trust arises when one person transfers a legal title to another with the understanding that the property will be used for a certain purpose. Generally, it is necessary to establish an oral trust by clear and convincing evidence.<sup>11</sup>

## 7. Convenience account

Sometimes, the older adult and another family member have a joint account, and funds are withdrawn from the account either while the older adult was alive or after death. The rules regarding the older adult's intention in creating the joint account are complicated. They depend on the nature of the documents signed at the time of creation, as well as the type of institution where the funds are held. Typically, but not always, the creation of such accounts gives rise to presumption of survivorship rights after the older adult dies. The law regarding the right of invasion during life is less clear, and often becomes an equitable action of recovery under theories like constructive trust. In addition, there are typically state banking (and credit union) laws that apply, again, depending on the nature of the form used by the bank and the type of institution.<sup>12</sup>

## 8. Fraud

Fraud or misrepresentation is a complex cause of action, which includes fraud in the inducement (misrepresentation about a material fact causing the victim to enter into an agreement) and fraud in the fact

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<sup>8</sup> Kar v. Hogan, 221 N.W.2d 417, 54 Mich. App. 664.

<sup>9</sup> MCL 700.1214.

<sup>10</sup> MCL 600.2919(a).

<sup>11</sup> MCL 700.7407.

<sup>12</sup> MCL 487.711, MCL 487.716; MCL 490.56, MCL 490.58.

(misleading a victim about the instrument itself). Fraud must always be pled with specificity.

## 9. Duress

Duress is a common law cause of action whereby some use of force is used to compel another to act against their interest.

## 10. Unconscionability

A contract must be both procedurally and substantively unconscionable to set it aside on the grounds of unconscionability. Procedural unconscionability arises where there is an advantage of knowledge or power in the hands of one party. Substantive unconscionability asserts that the deal itself is grossly unfair.

## Procedural Issues

### Introduction

In Michigan, and presumably most states, there is a circuit court which is the court of general jurisdiction. Other courts are courts of limited jurisdiction, and this includes the probate court.

The probate court is generally the court with exclusive jurisdiction over trusts, decedent's estates, and protected persons (including adult guardianships and conservatorships). In Michigan, the term *guardian* is applied to an adult who had capacity but is no longer able to represent their own interests, with respect to medical and personal care. The term *conservator* is used to mean a court-appointed fiduciary over such person's assets ("guardian of the estate" in some jurisdictions). Further, in Michigan, a "voluntary conservatorship" can be established by an adult who is competent but physically frail and desires to have a fiduciary appointed for their protection.

In addition to the types of matters that are exclusively within the jurisdiction of the probate court, there are matters over which the probate and circuit court have concurrent jurisdiction. Of the theories discussed above, most could arise in either court. However, in order for the probate court to hear these matters, a nexus with the probate court must be established.

Probate courts, like circuit courts, are given both legal and equitable powers.

### Identifying the client

If the older adult victim is competent to retain counsel, the older adult will retain a lawyer themselves. However, if that person is deceased or incompetent, the attorney may represent the individual through an agency. If the older adult is alive and there is a power of attorney that allows the agent to provide representation in litigation, that might be an option to consider, although in practice it is often the case that a court does not recognize such an agency and will require representation through a court appointed fiduciary.

There are also times when representation of an "interested person" who is not the victim of exploitation may best serve the objectives. In cases where the document being contested is a will or trust, the attorney must be mindful of the rules relating to terror clauses if they are at issue, which considerations are beyond the scope of this presentation.

### Identifying the court

Litigators should be comfortable in either circuit or probate court. That said, the procedural rules are often different in these two courts, and the litigator may find reasons to want to bring an action in one court or another. Generally, probate courts are less busy, and the probate judges are often more familiar with the types of theories that come up in these cases.

## When Probate Court is the Preferred Forum

Sometimes, if probate court is the preferred forum, it is possible at times to bootstrap a case into probate court. In Michigan, the term “proceeding” means an action involving a matter *exclusively* within the jurisdiction of the probate court, and “civil action” means an action that *could* be brought in circuit court. When the litigant desires to bring a civil action in a matter where the probate court has concurrent jurisdiction, the litigant must: **1)** establish a nexus to the probate court, and **2)** initiate the proceeding to establish that nexus before initiating the civil action.

For example, if the case is an effort to recover misappropriated funds from an older adult who is deceased, the litigator would normally: **1)** open an estate and then, **2)** initiate a civil action with the executor as plaintiff. Likewise, if the victim of exploitation is still alive, the litigator would initiate a conservatorship and then have the conservator act as plaintiff. As discussed above, it is not always required that the exploited older adult be incompetent to create this nexus, where a “voluntary conservatorship” can be established.

For example, a probate court may be preferred where the judge is particularly sensitive to exploitation of vulnerable adults, has experience with such matters, or where the attorney has an established reputation with the judge or with the subject matter.

Once a civil action is started in probate court, the general rules of civil procedure (as opposed to the rules relating to probate proceedings) control the process of the case.

## Guardian ad litem and court-appointed experts

When a probate proceeding is initiated to establish a guardianship or conservatorship, a court will often appoint someone to investigate the situation and report back to the court (guardian ad litem). The court may order an independent medical expert to review of the cognitive condition of the older adult. These court agents play a critical role in the case, and should be attended carefully. Unless the court orders otherwise, it is generally not wrong to share information with the medical expert. Without the attorney’s input, these agents will often have their perspective (and as a result, the court’s perspective) slanted by the “historian” or family member(s) who are in control of the vulnerable adult at the time(s) they are interviewed.

## Counsel for the older adult

One of the most uncomfortable aspects of this type of litigation arises when the older adult is alive, and is being manipulated by one or more bad actors, and those bad actors are able to take the older adult to an attorney and have them “retain” that attorney. Arguing before a court that an attorney who has appeared on behalf of an older adult is not really representing that person but is in fact representing the interests of bad actors who are controlling that older adult is tantamount to asserting that this attorney is unethical. When this happens, among other things, the parties seeking to protect the older adult can find themselves spending legal fees while their opposing interests are being funded by the resources of the older adult.

There is little law on this issue. Judges often shy away from such issues, and may look askance at any lawyer who makes such allegations, especially if the attorney who appears is known to the court. Tread lightly here, but don’t be afraid to raise the issue if the situation justifies it.

## Jury and bench trials

Outside the context of trial on the need for a guardianship or conservatorship, in which only the protected person has a right to request a jury, most fact issues that could be tried to a jury in circuit court can be tried to

a jury in probate court. There are important considerations in deciding whether to file a jury demand, which normally has to be filed at the outset of the case. The factors that go into that calculation are beyond the scope of this Issue Brief.

## Evidentiary issues

A litigator needs to understand the general rules of evidence, and the particular rules regarding discovery and admissibility that apply to these types of cases. Among other unique evidentiary issues frequently arising in these types of cases are: the ability to admit statements of the deceased older adult over hearsay objections; the ability to depose the attorney who may have been involved in the transaction; as well as the extent to which medical reports and other evidence must be contemporaneous to the date of the transaction at issue. On the issue of contemporaneousness, is the concept of a “lucid moment,” which can be raised to suggest that notwithstanding evidence of cognitive decline, the victim may have had a “good day” on the date that the instrument at issue was executed.

### FACT PATTERN EXAMPLE

Over time, litigators navigating these cases will become familiar with common factual patterns. Certain litigation strategies and procedures better suit certain patterns. Here is an example of one litigation strategy for a common fact pattern:

Older Adult survives spouse and lives alone in the family home. There are three adult children, but only one remains in the community. That child, Adult Child, has had ups and downs and now lives with the Older Adult parent, and to help with maintaining independence. The modest resources of the Adult Child are combined with the income of the Older Adult to support the household. The Older Adult is declining. This decline brings an increase in Adult Child’s caregiving duties, and the Older Adult’s savings are tapped for the benefit of Adult Child as a caregiver. The other children begin to inquire as to the financial arrangements between the Older Adult and the Adult Child, and the Adult Child becomes defensive. The Adult Child suggests to the Older Adult the other children are “only interested in money” or that they “want you placed in an institution.” As the Older Adult further declines, her fear of institutional care is heightened, she becomes more susceptible to suggestions that the distant children are “against” her and the Adult Child. The Adult Child becomes more aggressive as the decline increases, and uses language associated with “Medicaid planning” to justify further invasions of the Older Adult’s resources. At this stage, the Adult Child is also rebuffing visits from the other children and monitoring telephone contact.

If contacted by a concerned but distant child, the attorney may look to initiating a guardianship and/or conservatorship to allow for investigation and discovery. The decision to proceed is always difficult. Proceeding can tear at family and impose stress and indignity on the Older Adult (forcing a court proceeding at which capacity and independence are questioned).

These cases are also challenging because the Older Adult will likely have created estate planning documents that appoint the Adult Child as fiduciary for both medical and financial decisions. When interviewed, the Older Adult will almost certainly nominate the Adult Child to serve as guardian and conservator, if the court does appoint a fiduciary.

It is important to watch out for the Adult Child taking the Older Adult to a lawyer who purports to act as counsel for the Older Adult, but who may be advocating for the interests of the Adult Child.

However, most probate judges will recognize the red flags in this situation, and may appoint distant child to serve as fiduciary, or may appoint a non-family member. If a client becomes the conservator, and they find misappropriation of assets, they may initiate an appropriate proceeding or civil action to recover the resources.

It is common, for example, for a party who is engaged in exploitation, to isolate the Older Adult from trusted family and friends while alienating their affections by playing on fears and insecurities. It is common for things like “Medicaid planning” to be used as justification to convince an Older Adult to part with their resources. And it is common for Older Adults to be told that they must engage in certain transfers in order to avoid being institutionalized. There are more—but this gives you an idea.

## Conclusion

All litigation is about stories. Judges, juries and everyone involved in these cases will try to understand the situation by putting those facts that are available into the context of a sensible narrative. A litigator’s job is to create that narrative, to develop bullet points that support that narrative, and to repeat those bullet points at every possible opportunity. Trying to explain every detail is not helpful. These cases are too complicated and too gray to hope that a jury or judge will ever understand every fact or nuance. Remember, the litigator that controls the narrative, controls the case.

## Additional Resources

- National Center on Elder Abuse: [ncea.acl.gov](http://ncea.acl.gov)
- Center for Elder Mistreatment: [eldermistreatment.usc.edu](http://eldermistreatment.usc.edu)
- Legal Basics: Elder Financial Exploitation, National Center on Law & Elder Rights, [ncler.acl.gov/pdf/Legal%20Basics-Elder\\_Financial\\_Exploitation\\_Chapter\\_Summary.pdf](http://ncler.acl.gov/pdf/Legal%20Basics-Elder_Financial_Exploitation_Chapter_Summary.pdf).
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**Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov).**

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