

# Litigating Financial Exploitation Cases in State Courts

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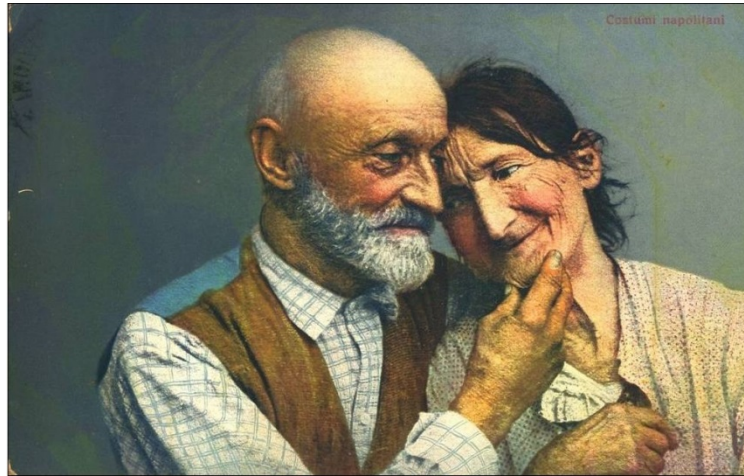
# Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems with getting on to the webinar? Send an e-mail to [NCLER@acl.hhs.gov](mailto:NCLER@acl.hhs.gov).
- Slides and a recording will be available at [NCLER.acl.gov](http://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.

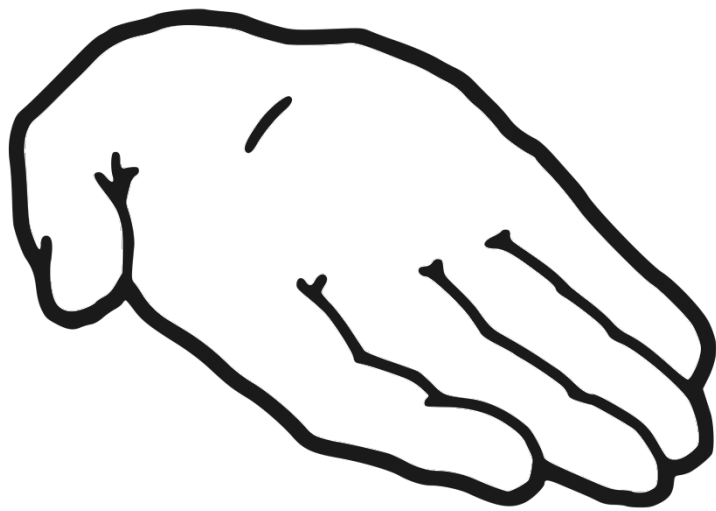
# Why Financial Exploitation of Vulnerable Adults Litigation is on the Rise



- People are living longer
- Families are more disjointed
- Age-related cognitive impairments are an epidemic
- Getting old is impactful

# It's All Gray

- Cognition
- Legal Theories
- Personality
- Family Dynamics



# Evaluating Case



# Evaluating Cases

- Credibility of the potential client.
  - What are their motives, defects?
- The other side.
- Likelihood of recovery (collectability) v just a criminal matter.
- Proofs issues.
- Will the legal costs justify?
  - Not an issue for legal services or pro bono matters

# Case Example: Exploitation by Adult Child (1 of 2)

- Adult child living in parent's basement:
  - Sometimes he has become financially dependent on his mother, and as she ages and becomes more frail, that dependence evolves into outright exploitation.

# Case Example: Exploitation by Adult Child (2 of 2)

- Adult child living in parent's basement:
  - Sometimes he is the only person who cares about his mother, and the only reason that she is able to remain independent and at home.

But often it's some of both....

# Incapacity and Vulnerability (1 of 3)

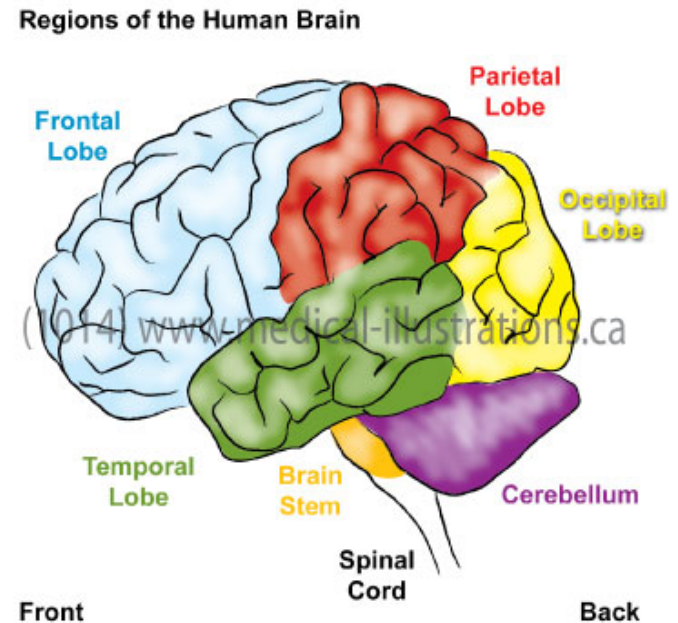
- Traditional concept of incapacity: unable to make informed decisions.
- The ability to weigh risks v benefits. Function of how complex the decision.
- Court (state) intervention only triggered where some physical disease or condition has rendered the person impaired.
- “Just because I’m old doesn’t mean I can’t make bad decisions.”

# Incapacity and Vulnerability (2 of 3)

- Courts look for medical evidence, and disproportionately rely on popular concepts of memory loss.

# Incapacity and Vulnerability (3 of 3)

- Alzheimer's
- Lewy Body Dementia
- Frontal Lobe
- Mini-strokes
- Drug and alcohol induced
- Paranoia
- Depression and M.I.
- Judgment, executive function, memory



# Native Personality

- Egotistical
- Dependent
- Narcissistic
- Confrontational
- Non-confrontational
- Giving
- Depressed
- Judgmental

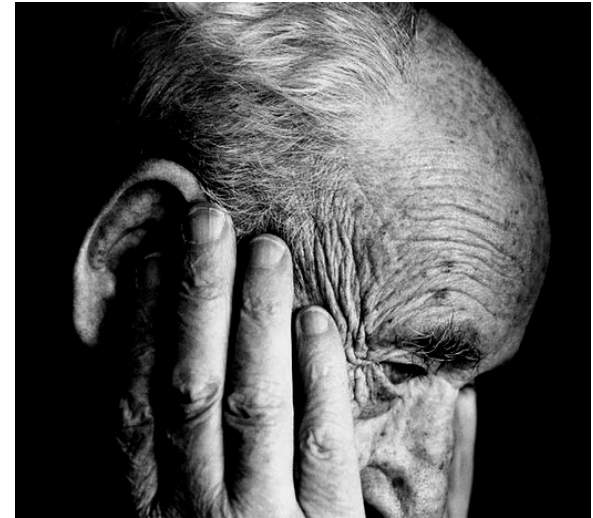


# Family Dynamics



# Fears of Aging

- Loss of independence
- Reliance on others
- Physical limitations
- Cognitive impairments
- Loss of loved ones
- Loss of identity/sense of purpose
- Loss of financial security



# Beyond Cognitive Decline

## Dr. Peter Lichtenberg, Ph.D.:

Historically research on older adults and vulnerability to exploitation has been overly focused on linking vulnerability to cognitive impairments, and particularly age-related dementing conditions such as Alzheimer's Diseases. Dr. Lichtenberg's research indicates that vulnerability is as closely linked to social isolation and lack of empowerment as it is to organic conditions of the brain.



# Financial Capacity is an Early Victim of Cognitive Impairment

In terms of the impact of age-related cognitive impairment and vulnerability to financial exploitation, Dr. Lichtenberg's research concludes that financial capacity is among the first skills to be compromised in the dementing process. People can become vulnerable to exploitation even before it is clear they are cognitively impaired.

- The Lichtenberg Financial Decision-Making Rating Scale at <https://olderadultnestegg.com/>



# The Legal Theories

# The Legal Theories (1 of 2)



Old, often outdated, concepts evolving, but still awkwardly trying to fit the needs of today's age of living to be 100, and an epidemic of age-related cognitive impairment.

# The Legal Theories (2 of 2)

- Burden always on the party challenging a transaction.

# Lack of Capacity

- Inability to make one's own choices – to weigh risk and reward.
- The standard required to trigger court (state) intervention is the presumptive right of individuals to exercise independent choice.
- Differing standards for contract, wills and trusts.  
Capacity to create an agency generally contractual.



# Undue Influence (1 of 2)

- The theory through which many of these cases are given life.
  - They may be competent, but a bad person overcame their volition.
- High standard of proof.
- Does not require incompetence, but not unrelated: the ability to resist manipulation declines with cognition.

# Undue Influence (2 of 2)

- The presumption of undue influence:
  - Fiduciary relationship
    - Formal and informal
  - Opportunity
  - Benefit

# Breach of Fiduciary Duty

- Fiduciary relationship as contrasted with contract law.
- Formal fiduciary relationships often have remedies for breach defined by law:
  - Executor, Trustee, Conservator, etc.
- Breach of Fiduciary Relationship can be pled wherever a fiduciary duty is established.

# Conversion

- The assertion of ownership over the property of another.
- Common law cause of action, related to embezzlement. Sometimes defined statutorily.
- May give rise to supplemental damages.

# Constructive Trust

- Equitable theory used as a cause of action.
- Broad court power to correct injustice.
- Underused theory.

# Oral Trust

- Agreement existed that although legal title vests in A was intended to be held for the benefit of B.
- Generally requires high standard of proof.

# Convenience Accounts

- Although survivorship rights presumptively vest in surviving owner, the intention of contributing party was otherwise.
- Controlled by statute, but also exists at common law.
- Dependent on nature of forms used at time of account creation, and on nature of institution.
- Issues with proof.
- Invasion during lifetime may be different, may trigger equitable relief (constructive trust).
- Very common.

# Fraud

- Party misleads regarding material fact to engage in transaction.
  - Must be pled with specificity.



# Duress

- For example: “I’ll put you in a nursing home unless”?

# Unconscionable

- Substantive: The deal was grossly unfair.
- Procedural: Unequal bargaining power.

# Procedural Issues

- Jurisdiction
- Venue
- Pleading
- Discovery
- Statutes of Limitations

# Identifying the Client

- Where the injured party is dead or incompetent, representation is often through an agency.
- POA's not normally adequate for litigation, notwithstanding the language of the POA.
- Representing other interests may sometimes be appropriate:
  - In guardianship/conservatorship.
  - Beneficiary of will or trust.

# Identifying the Court

- Court of General Jurisdiction v Courts of statutory limited jurisdiction, such as the probate court.
- Probate proceedings v civil actions.
  - Different pleadings, potentially different discovery rules, and potentially different rules regarding jury availability.
  - Some wrongs may be framed to meet jurisdictional objectives.
  - Opportunities to bootstrap civil actions to probate court.

# Court Appointed Players

- In guardianship and conservatorship matters:
  - Court investigators or guardians ad litem.
  - Court medical/psychiatric experts.
  - Can play a huge role.
- Don't be afraid to communicate your side before they formulate a position; unless the court expressly prohibits.
- Understand the role of the “historian.”

# Retained Counsel for Vulnerable Adults

- Capacity to retain counsel.
  - There's a difference between a long-standing legal counsel for an older adult and a attorney only recently retained by with the assistance of one of the parties.
- The ability to finance litigation from resources of vulnerable adult.
- Be wary: attacking attorney-client relationship is dicey.

# Jury v Bench Trials

- Know your judge.
- General rule:
  - Bench where law is in your favor.
  - Jury where the sympathies are in your favor.
- Must be demanded at outset.



# Evidentiary Issues

- Release of medical and legal records.
- Admissibility of statements of deceased individuals or individuals too impaired to testify.
  - Hearsay objections
- Exclusions based on contemporaneousness of evidence.
- The “lucid moment” rule.

# Common Patterns

- Isolation and alienation.
- New friends and advisors.
- Lack of transparency.
- Asset protection concepts.

# Case Study

- Older adult in care of one of several children. Expenses shared.
- Capacity gray at least to begin with.
- As capacity dwindles, increased perceived overreaching.
- Alienation, paranoia and distrust in older adult toward distant children.
- Estate plan and older adult nominate caregiver child to fiduciary roles.

# Conclusion

- Litigation is about stories.
- Judges, juries and all others involved, will look for counsel to create a believable narrative from the admissible evidence.
- Those that do this well will succeed, those that don't will struggle.
- Know your key points and stick to them.

# Discussion

# Additional Resources

- Doug Chalgian:
  - [chalgian@mielderlaw.com](mailto:chalgian@mielderlaw.com)
- National Center on Law and Elder Rights:
  - <http://ncler.acl.gov>
- Wayne State University Department of Gerontology,  
Dr. Peter Lichtenberg:
  - <https://olderadultnestegg.com>

# Case Consultations

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).