Marquette Elder's Advisor

Volume 1
Issue 1 *Summer*

Article 7

Financial Abuses of Elderly Clients

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Financial Abuses of Elderly Clients

The handling of financial abuse of the elderly carries with it particularly sticky issues above and beyond those encountered with physical or emotional abuse. Current standards of practice walk a fine line to ensure acting in the best interests of the victim.

By Alison Barnes

Your client, Mrs. Wing, has been widowed for many years and has become quite frail. You have visited her in her home seven times in three or four years to discuss the disposition of properties she and her husband bought with their laboriously won farm wages. She has few things of real value, but items of great pride are small, antique carvings belonging to her family for generations, carried with her as a young immigrant to the United States. Since she has modest needs, she is otherwise comfortable on a small pension from her lifelong employer (as a former agricultural worker she did not pay into Social Security) and the tiny rents from remaining properties rented to current farm laborers.

A niece, Rose, moves in with Mrs. Wing to provide services in return for housing and a small salary. Soon after, Mrs. Wing calls you complaining about numerous dissatisfactions: the municipality does a very poor job of street cleaning and trash removal, her poor eyesight is a constant source of frustration to her independence, and things (objects) are not where they belong. You think Mrs. Wing, at 92, is at last getting old and querulous.

You might be right, since the statistical likelihood of mental confusion increases dramatically with age. But the generality does not equal the reality for any particular older person. Instead, the loss of valued objects may signal a pattern of financial abuse that can extend to bank accounts and even real property.

The Denial of Abuse

Americans "discovered" domestic abuse in the past 25 years, moving the national consciousness from Ralph Kramden in *The Honeymooners* (that lovable lout who joked "Pow, Alice! Right in the kisser!") into spousal abuse and retaliation as related in movies such as *The Burning Bed* and real-life headlines such as the Bobbitt case. Incidents of abuse of children—violent, psychological, or sexual—are all too common in the pages of any local newspaper.

Finally, we as a society grappled with the problem of elder abuse, acknowledging in this decade more than 2 million cases annually. Some people, we realize, yell and hit and insult elderly relatives and cohabitants. Most often the abusers are caregivers, since the caregiver role brings both the opportunity and the associated frequently high lev-

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els of stress. Indeed, many statutory definitions of abuse require recurring behavior.

The caregiver who abuses is a sign of a fractured dependency relationship. While it is incorrect to blame the elderly victim, caregiving takes two: caregiver and care recipient. Either person, or both, can be unreasonably demanding, either emotionally or physically or both.

Financial Abuse

Financial abuse is more elusive in its definition than is physical abuse. People give away money or things, or acquiesce to the use of their income and assets, for many reasons. The very definitions of financial abuse are circular in definition, as seen in Hawaii Statute HI 346-222, which calls financial abuse

> the *wrongful* . . . taking, withholding, *misappropriation* . . . of money or property . . . including but not limited to *unauthorized* sales or transfer . . . *unauthorized* taking of personal assets. [Emphasis added.]

The deprivation "may involve coercion, manipulation, threats, intimidation."

More than one fourth of the abuse incidents estimated by the National Council on Elder Abuse (NCEA) involve financial or material abuse. The profile of the financial abuse victim is less predictable than for other types of abuse. Older people of any socioeconomic and ethnic-racial background might be exploited for their income or assets, even if the only gain is a small government check.

Financial abuse may be inferred from the results of the misuse of funds. The elder may not have enough to eat, or assets are transferred to someone whose relationship to the elder is recent or tenuous. The observer judges that the older person *should not* so benefit an abuser, even if that person is the natural object of his or her bounty.

Financial abuse of the elderly also includes consumer scams that target older victims. A number of common scams have been around for decades, including bogus house repairs and "bank examiner" frauds in which the victim is asked to test the honesty of a money handler by transferring savings that is supposed to be restored to the owner later. Particular health products are marketed to the elderly (and to their aging babyboomer children!) to restore vitality or other youthful attributes.

Investment scams have become the fastest growing type of fraud, growing three times faster than any other type of fraud. For example, a common telephone investment scam is precious metals in the form of coins, which never arrive or are worthless trinkets. An important cause for the rapid growth of such frauds is digital dialing, which has brought a scourge of solicitation calls to most households. Many older people are vulnerable to such financial schemers because they live alone and may be inclined to talk to a telemarketer. The sales pitch may never be tested for its reasonableness by relating the deal to someone more skeptical. The problem is especially acute in times of low interest on investments or economic turmoil, since many older people depend on their resources to generate enough income for their lifestyle and would like the opportunity to make the kind of interest rates available in other economic times.

Abusers and Victims

The profile of the abuse victim (financial or otherwise) is a woman over the age of 75, perhaps because of vulnerability and sheer numbers. The victim may have no assets other than a government check that can be wrongfully appropriated. Being careful not to blame the victim, it must be noted that many abusers are formerly abused children. The long history of intimate, violent, or exploitative interaction blurs the line between abuser and abused. In many instances of elder abuse, the observer will not hear or see acts of coercion, and in fact such actions may never take place. Rather, the basis for the exploitation may lie in facts and assumptions underlying the dependency relationship itself.

Perhaps surprisingly, the caregiver who is financially dependent on the victim, like Mrs. Wing's niece, has a greater likelihood of becoming an abuser. Abusers are significantly more dependent on the elderly victim for financial assistance, housing, household repair, and transportation than are nonabusers, and that dependence creates hostility that may be expressed by abuse, exploitation, or neglect.

The majority and traditional view is that victims are too ashamed or otherwise reluctant to tell even if asked by authorities. According to some studies, 90 percent do not report their loss. In contrast, some studies suggest that when there is ongoing abuse, financial or otherwise, many older people tell others and even ask for help to end their abusive circumstances, but find that appropriate, reliable services are not available for them. The lack is particularly clear when the caregiving relationship would be interrupted by the intervention.

Identifying Financial Abuse

In Mrs. Wing's situation, it is appropriate to consider the possibility of financial abuse. She has called you to complain of problems, including missing property. Possibly she will agree to your investigation of financial matters, if you do not already have such authority. You should look for any of the following symptoms:

- Change in banking activity, such as unaccounted for withdrawals or the account holder relinquishing check writing to another.
- Bills that go unpaid and necessities that are absent or scarce, even though there is enough income to provide for them. The older person may have no television or no reliable transportation even though these are significant and affordable amenities.
- The elder gives a power of attorney, transfers property, or makes a major change in a will, particularly when some uneven exchange is contemplated or the recipient of the gift is not a close friend or companion of some duration.
- The family member or friend asks only about costs or, in contrast, gushes about how wonderful the older person is, rather than showing interest in the quality or appropriateness of care.
- The family member or friend wants to be present at all interviews or conceal financial records, in an effort to isolate the older person.

Ethical Options

In many states, certain professionals are required to report suspected elder abuse to protective services investigators. The list, which includes doctors and often social workers, cannot and does not include lawyers. Without Mrs. Wing's consent, her legal counsel is bound by the ethics of legal practice with regard to the steps available to identify and remedy possible financial abuse.

Most significant is the standard of confidentiality found in Rule 1.6(b):

> A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation [except for disclosures having implied authorization in order to carry out the representation].

Certainly, an attorney would not usually act to protect a client's financial interests over the client's objection.

However, some attorneys find room in the confidentiality standard for disclosure, relying on Model Rule 1.14 on the relationship with a client under a disability. MR 1.14(b) says

> A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Mrs. Wing's counsel might reasonably conclude that she is unable in her circumstances to act to protect her finances.

MR 1.6 is helpful, in that it concludes with implied authorization for actions. Arguably, authority for a long chain of lawyer actions derives from decisions made before the client became incapacitated.

State Protective Services Systems

Every state responds to elder abuse with some form of protective services law, which may be a corollary to child abuse statutes, may cover disabled adults of any age, or may apply only to older persons.

Such statutes typically are intended only to prescribe the process to intervention in an abuse situation and the services available to persons protected by the statute. Protective services are initiated either by a request from an abused or neglected older person or a report by a third party who suspects abuse or neglect. Typically, a report is made to the state social services agency, often using a toll-free number dedicated to this purpose. A social worker investigates the allegation within a limited period of time, generally by visiting the place of residence to observe and talk with the individuals.

If the state worker is denied access to the alleged victim, the worker might be authorized to enter without a court order if the elapsed time would result in greater risk of physical harm to the individual. If circumstances are not so urgent, most state laws provide for an *ex parte* hearing to show cause to suspect that abuse is occurring. Having obtained the order, the worker usually returns with an officer of the law to complete the investigation.

If the alleged victim does not consent to intervention, the state may provide services without consent provided there is a need to prevent imminent harm to the individual's health or safety. However, the length of time the state can impose unwanted services is short, generally 48 to 72 hours. If, during that time, the state cannot show that the individual is likely to be found to be incompetent, services must end. Any further involvement requires that the state initiate guardianship proceedings, and services can be extended by court order pending that hearing.

Services generally include social, financial, and psychological services intended to assist the older person by providing watchful oversight and easing caregiver strain that might be a cause of the abuse.

For the person who is financially exploited by a caregiver, protective services are often an inadequate or ill-fitted response to the need. The type of services available is frequently determined by scarce state funds, and the need for care might become greater if the primary caregiver does not continue in that role. Many protective services workers are reluctant to intervene and create the need for nursing home placement unless the financial exploitation is part of a pattern including other forms of abuse. Indeed, even if the caregiving relationship has many flaws, the state may undertake a plan for continued assistance and oversight in the home.

Federal Responses to Elder Abuse

The federal government has attempted to bolster efforts against elder abuse. Every state must have an Office of the Long Term Care Ombudsman to respond to complaints about care, including financial abuse. Further, the 1992 amendments to Title VII of the Older Americans Act (OAA) attempted to make social services programs more effective in preventing and identifying elder abuse by coordinating OAA and APS programs. To combat financial abuse specifically, Congress in 1994 enacted SCAMS, the Senior Citizens Against Marketing Scams Act, providing penalties for consumer and investment fraud particularly by means of interstate calls, which are difficult for states to police.

Conclusion

Protective services intervention is a radical solution that is justified when financial abuse deprives the older person of resources for significant needs and advantages, or when severing of the relationship is not a greater burden for the elder than the risk of ongoing abuse. Usually, the best judgment about this balancing of the elder's interests is made by the elder personally. When the exploiter is a virtual stranger, the choice to sever all ties is an easy one. However, some individuals who are not family members or personal care providers, such as religious leaders, may be of great emotional importance to the older person. If the exploitation does not deprive the older person of necessities, the decision to give money or property, or allow it to be taken, must generally be that of the older property holder.

If the older person is dependent on a family member or long-time companion for care, the need to limit financial exploitation must be acute to justify protective services intervention. Absent other abuses, the best course is to arrange for frequent visitors to oversee the interaction between caregiver and care receiver and for revision of financial arrangements to limit the loss to the elder's assets.