COMMITTEE REPORT:
ELDER CARE

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Financial Elder Abuse/Exploitation: An Epidemic?

What should estate planners be aware of, and what can they ethically do?

Financial exploitation (also referred to as "financial abuse") of elders has become an all too common phenomenon frequently perpetrated by family members, friends, caregivers, "lovers" or other trusted persons. When lecturing on this topic and asking attorneys in attendance if they've encountered financial elder abuse in their practice, a show of hands typically reveals that about one third have encountered some form of such abuse. The manipulation of elders to reap financial rewards isn't novel and has been the subject of much litigation.

As medicine and technology increase average life expectancies, the percentage and population of elderly individuals will continue to rise. As a result, state bars and legislatures should enact laws to protect elders to a greater degree and provide better tools for enforcement of such laws. They should also protect attorneys who may report elder financial abuse or suggest and implement estate-planning techniques to reduce an elderly client's ability to unilaterally change his estate plan or make significant gifts, by requiring the advance consent of a third party such as a trusted family member, friend, CPA, attorney or a panel comprised of two or more such persons with the objective of avoiding financial exploitation of such elder.

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What's Financial Exploitation?

As clients age, many experience a decline in their mental and/or physical capabilities and become unable to care for themselves. As a result, they become dependent on others and prone to financial exploitation.

On its website, the Florida Department of Children and Families (DCF) defines "adult exploitation" in two ways:

> Adult exploitation means a person who stands in a position of trust and confidence with a vulnerable adult knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.
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> OR
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> . . . a person who knows or should know that the vulnerable adult lacks the capacity to consent, obtains or uses, or endeavors to obtain or use, the vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.[1]

Only approximately 5 percent of complaints of alleged abuse reported to Florida's DCF resulted in prosecution.[2] Without the cooperation of the individual who's the subject of abuse, the laws providing protection are difficult to enforce.

Roadblocks Faced by Attorneys

Attorneys who try to be trailblazers in this area face roadblocks and may find themselves in hot water. Once an elder is involved with an individual who may be taking advantage of him, it may be too late for estate planners to come to the rescue, and the better or more practical remedy is to bring litigation after the elder's death. Attorney confidentiality issues make it difficult or impossible to inform family members of a client's diminishing capacity and concerns about new relations. This problem gets worse when the attorney has been terminated, typically when the caregiver, lover or friend is able to sway the elder to hire another attorney.

Risky Business

When attorneys try to be proactive in preventing abuse of their clients, they may risk having their clients turn against them, thus discouraging attorneys from taking this step. In *Dunn v. Patterson*,[3] a well-intentioned lawyer had to endure six years of litigation to exonerate himself from claims of misconduct. Lawrence Patterson, an Illinois attorney, represented the Dunns (an elderly couple) in connection with their estate planning. Each document he created for the Dunns included a qualified amendment and revocation provision, requiring that any amendment or revocation of the documents could only be executed with Lawrence's written consent or by order of the court.[4] Lawrence advised his clients that the trust protector provision would protect the original purpose of the trust from changes made through undue influence or elder abuse.[5] He entered into a written retainer agreement with the Dunns in which they agreed to pay him $225 per hour, with total fees not exceeding $2,850 without the Dunns' consent.[6]

The Dunns executed their documents on June 12, 2006.[7] Five months later, Lawrence received a letter from another attorney, Timothy McJoynt, informing Lawrence that the Dunns had retained Timothy to modify the estate plan that Lawrence had drafted and that the Dunns "no longer wanted their ability to revoke or amend their estate planning documents to be contingent on Patterson's approval and, therefore, wished to remove his name from the documents and make other minor amendments."[8] Lawrence responded by letter on Nov. 16, 2006, stating, in pertinent part, "For my clients to make any changes in their plan it is necessary for both of them to discuss those changes with me and for me to then determine whether the changes are consistent with the interests and protections embodied in the original plan" and that if the Dunns were unwilling to personally meet with him, their only other alternative was to petition the court for leave to amend the documents.[9] The Dunns filed suit against Lawrence, seeking a declaratory judgment that Lawrence's revocation and amendment provisions in the estate plans were void as against public policy.[10]

The circuit court found that the qualified revocation or amendment provision requiring Lawrence's approval was contrary to public policy and void because it ignored the provisions of Supreme Court Rule of Professional Conduct 1.2—that an attorney is obligated to abide by his client's decision so long as the direction given by the client isn't contrary to the law, unethical or otherwise in violation of an ethical or legal obligation—and entered judgment on the pleadings.[11] On appeal, the Illinois appellate court found that Lawrence's conduct wasn't sanctionable.[12] Under Illinois law, provisions requiring a third party's consent to modify a trust are permissible.[13] Thus, the appellate court held:

> Provisions in estate planning documents, which limited elderly clients' power to amend or revoke documents by requiring consent of attorney, or alternatively, consent of court, were not void as against public policy or violative of rule of professional conduct requiring attorney to follow clients' instructions, notwithstanding that attorney drafted documents, where attorney did not mislead clients, clients were informed of provisions, attorney did not have financial stake in estate plan, and attorney, following his discharge by clients, sought

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to meet with them before agreeing to grant or refuse consent.[14]

The appellate court noted that the revocation provisions executed by the Dunns were consistent with the duty of an attorney to follow his clients' instructions pursuant to Rule 1.2 of the Rules of Professional Conduct.[15] Under the assumption that Lawrence was terminated as the Dunns' attorney, he wasn't acting as the Dunns' attorney when he declined to consent to the revocation of the trust and, therefore, didn't violate his duty to follow his clients' wishes.[16] The appellate court stated that with respect to Lawrence's actions in creating the documents and trying to meet with his former clients, "We do not find Patterson sanctionable. Rather, we find it admirable and consistent with the highest ideals of the bar. In light of the obvious expense to Patterson, we will leave it to other estate planners whether they wish to use this particular method of estate planning."[17]

> Frequently, the elder who's being abused defends his abuser, unwilling to acknowledge that someone he cares about may be taking advantage of him.

The Illinois Attorney Registration & Disciplinary Commission (ARDC) filed a disciplinary action against Lawrence approximately nine months after the circuit court determined the qualified amendment provisions he drafted to be contrary to public policy.[18] While the disciplinary decision was pending, the appellate court reversed the circuit court's decision.[19] One of the counts in the disciplinary action related to the Dunns alleging overreaching of the attorney-client relationship and the failure of Lawrence to abide by his clients' decisions concerning the objectives of representation in violation of Rule 1.2(a) of the Illinois Rules of Professional Conduct.

The majority of the ARDC's Hearing Board found that, by refusing to meet with the Dunns when they obtained new counsel and continuing to bill legal fees to them after he no longer represented them, Lawrence engaged in conduct involving dishonesty, fraud, deceit or misrepresentation; conduct that was prejudicial to the administration of justice; and conduct tending to defeat the administration of justice or to bring the courts or the legal profession into disrepute. The Hearing Board recommended that Lawrence be suspended from the practice of law for three months and until he completed the ARDC Professional Seminar.[20] The Hearing Board noted that Lawrence not only failed to meet with the Dunns, but also placed numerous conditions on the meeting that effectively prevented it from taking place, including advising the Dunns' new attorney he would charge $225 per hour for the meeting and that he wouldn't attend any meeting unless he met with the Dunns alone.[21] The Hearing Board found that, regardless of his trust protector role, Lawrence had no basis to refuse to meet with the Dunns in the presence of their attorney and therefore acted unreasonably.[22] The Hearing Board found that while Lawrence might have been entitled to some fee for acting in his capacity as trust protector, he wasn't entitled to bill the Dunns for legal services after his services were terminated and that, by doing so, Lawrence acted dishonestly and in a way that brings the legal profession into disrepute.[23]

Lawrence appealed to the ARDC Review Board. After the appellate court reversed the circuit court in the civil case, the Review Board examined and reversed the Hearing Board's decision.[24] The Review Board found that Lawrence didn't engage in misconduct by refusing to meet with the Dunns and their new counsel. Lawrence received no response when he: (1) wrote to the Dunns, asking them to sign and return an enclosed form stating that it was their intent to discharge him, and (2) advised the Dunns' new counsel that if the Dunns intended to terminate him and release him from liability, they needed to put it in writing. The fact that Lawrence "wished to determine that the Dunns were not being taken advantage of without the presence of the person who intended to 'dramatically change much of' what Respondent had put in place to protect them was not unreasonable."[25] The Review Board quoted the appellate court's description of what might have occurred had Lawrence agreed to make such changes without ascertaining that the Dunns were competent and not being unduly influenced

and stated that Patterson "might very well have been called to answer" why he'd done so.[26] The Review Board also found that the evidence was insufficient to support the Hearing Board's finding that Lawrence acted dishonestly in billing the Dunns for the time he expended in his role as their trust protector. In the Review Board's view, "the mere fact that Respondent characterized his time as legal services is not sufficient proof of dishonest intent."[27] Further, in his first communication with the Dunns' new counsel and several times thereafter, Lawrence suggested the court approval alternative to his qualified amendment and revocation provision. Had the Dunns and their counsel taken the court approval route, such additional fees would have been avoided.[28] Based on its findings, the Review Board concluded that Lawrence's actions didn't violate the Rules of Professional Conduct.

Hard to Prove

The National Conference of State Legislatures publishes an annual report on proposed and enacted legislation addressing financial crimes against the elderly. Its 2016 summary lists 33 states, the District of Columbia and Puerto Rico as having addressed some form of financial abuse of the elderly and vulnerable adults in various ways in the 2016 legislative session.[29]

Even in jurisdictions that have laws against exploitation of the elderly, it can be hard to bring a successful case. The laws are difficult to enforce without the cooperation of the individual who's the subject of abuse. Frequently, the elder who's being abused defends his abuser, unwilling to acknowledge that someone he cares about may be taking advantage of him. The elder may believe that an alleged abuser is the only individual preventing him from being placed in a nursing home.[30]

Florida Statutes Chapter 825 is titled "Abuse, Neglect, and Exploitation of Elderly Persons and Disabled Adults." Florida Statutes Section 825.101(4) defines an elderly person as "a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired."[31]

Florida Statutes Section 825.103(1) entitled "Exploitation of an elderly person or disabled adult; penalties" sets forth the elements of the crime of exploitation of the elderly. Specifically, exploitation of the elderly is committed when anyone who stands in a position of trust and confidence, or has a business relationship with the elderly person or disabled adult, knowingly obtains or uses that person's property for the temporary or permanent use of the offending person or a third person. The crime of exploitation of the elderly can result in a first-, second- or third-degree felony depending on the value of the property involved.[32]

Florida cases that have addressed Florida Statute 825.103 have largely held that the evidence was insufficient to support a conviction of exploitation of an elderly person or disabled adult.[33] In *Franke v. State*,[34] a Hollywood, Fla. 52-year-old stockbroker, Cynthia Franke, and her 48-year-old husband were found guilty of exploitation of the elderly in 2013 when they became the beneficiaries of 94-year-old Mary Teris' estate. A judge sentenced both to seven years in prison. However, Florida's Fourth District Court of Appeal reversed the husband's conviction after he spent two years in jail based on insufficient evidence. The same court reversed Cynthia's conviction in December 2015. The reasoning of the appeals court judges was somewhat surprising.

The state's case was based on two theories under Florida Statute 825.103. The first was that: "(1) the defendant stood in a position of trust and confidence with the victim; (2) the defendant obtained [or endeavored to obtain] funds belonging to the victim with the intent to temporarily or permanently deprive the victim of those funds; and (3) the defendant used deception or intimidation to obtain the funds."[35] The second theory required the state to prove that Cynthia obtained or endeavored to obtain funds belonging to Mary with the intent to temporarily or permanently deprive Mary of those funds and that Cynthia knew or should have known that Mary lacked the capacity to consent.[36]

The court focused on the terms "obtain" and "endeavor" in the statute, which required that Cynthia attempt or try to take or exercise control over Mary's property or that Cynthia use, dispose of or transfer Mary's property. The appeals court determined that this element was lacking under either theory:

> Under the first theory, the state argued that Cynthia endeavored to deceptively obtain Teris's property by having herself named as the residuary beneficiary when she 'guided' Teris

> to [attorney] Mr. Friedman, and was at the office—but not in the room—when some of the amendments were executed. However, this evidence is not inconsistent with Franke's theory that being named beneficiary was an unsolicited gift. Franke and Teris had been friends for thirty years and Franke constantly helped Teris throughout the years.[37]

Under the second theory, the state alleged that Cynthia endeavored to obtain Mary's property knowing that Mary lacked the capacity to consent. The court, however, determined that this theory failed "for the same reason as the first—the evidence was not inconsistent with Franke's hypothesis that she did not obtain or endeavor to obtain Teris's property because Teris named her a beneficiary as an unsolicited gift."[38]

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Further, the court noted that none of the property would pass to Cynthia until after Mary passed away and stated, "although we need not decide the issue in this case, it does not seem that obtaining the future expectancy of property under a will or trust falls under the purview of the statute. Prior reported cases which we have found addressing section 825.103 have concerned a present transfer of property, not a future expectancy in a will or trust."[39] The court in *Franke* stated, "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence."[40]

Possible Protections

How can attorneys protect elderly clients from financial exploitation if courts are willing to ignore exploitation when it applies only to a future expectancy in a will or trust and not a present transfer as decided in *Franke*?

Estate planners and financial advisors need to consider alternatives to help prevent financial exploitation that's best combatted before the potential abuser obtains a clear path to financial assets of the elderly client. Protections incorporated into estate plans may be an effective way to prevent financial exploitation. However, as noted in the discussion of *Dunn*, attorneys can find themselves in civil litigation and face ethical charges when trying to be proactive in helping their clients. While ultimately, the drafting attorney was cleared, the *Dunn* case provides due warning to attorneys who may otherwise be willing to be proactive in protecting their clients and is an example of why state legislatures should consider enacting laws to permit attorneys, financial institutions and others to be more proactive when signs of financial exploitation of clients become apparent without fearing civil litigation or Bar ethics violations.

Legislative solutions. *The New York Times* recently published an article titled, "Declaring War on Financial Abuse of Older People."[41] The article reports on the story of Amy A. Lecoq, whose grandmother, Mariana Cooper, was swindled out of her life savings by an individual who befriended her. Mariana was a widow who lived by herself. She gave more than $217,000 to her "friend" with the expectation that she would be paid back. Mariana first provided checks to her friend and subsequently gave her a power of attorney.[42]

The New York Times article quoted Senator Susan Collins (R-Maine) who called financial fraud against older Americans "a growing epidemic that costs seniors an estimated $2.9 billion annually."[43] Because financial elder exploitation is considered underreported by victims, exact statistics regarding how often it occurs aren't available.

Minnesota's Bill HF 3536 introduced in the 2015-2016 session wasn't enacted but included a comprehensive approach to protecting elders that should be considered, in our opinion, for all states. Among the provisions included were: (1) individuals who commit an act of financial exploitation against a decedent may be barred from any benefits under the elder's will, elective share and homestead, and the individual who committed the act of financial exploitation is treated as if such individual predeceased the elder even without a conviction if a judge finds by the preponderance of the

evidence that an act of financial exploitation occurred based on a number of factors to be considered as stated in the proposed statute; (2) insurance companies shall, pending a court order, withhold payment of policy proceeds to all beneficiaries when written notice has been provided that the insured may have been a victim of the crime of financial exploitation and the beneficiary may have perpetrated the crime; and (3) courts may hold assets otherwise distributable from an estate to the accused abuser in trust or escrow until the court determines if the accused abuser's interests are barred under the statute.[44]

Minnesota Bill H.F. 3536, if enacted, would have allowed a judge to withhold estate assets from a person accused of financial exploitation of a vulnerable adult.[45] As such, Minnesota provides an example of a proposed law that, if enacted in Florida, may have resulted in a different decision in *Franke* because it specifically addresses future inheritances, such as those from wills or trusts.

A California law proposal that wasn't enacted would have required an individual convicted of a crime involving the abuse of an elder adult to register for the remainder of his life with all police departments and the sheriff in the county where the individual was convicted and in the county where he resides. Under the bill, an individual who receives a certificate of rehabilitation and isn't in custody, on parole or on probation, may be relieved from the duty to register. The bill makes it a misdemeanor for an individual who's required to register to willfully violate any requirements related to registration.[46] New York created a statewide registry of elder abuse and maltreatment reports.[47] A New York proposed bill provides a third party who reports suspected financial abuse with immunity from any civil or criminal liability.[48]

Drafting solutions. Some techniques that we've used with success include having clients convey portions of their assets to irrevocable trusts with individuals other than the elder client as a co-trustee or as sole trustee. Some have appointed family members as trustees, and others have appointed corporate trustees. Each alternative requires the elder to agree to give up a level of control that he may be unwilling to do. When estate-planning attorneys discuss these issues with clients and suggest safeguards such as those previously noted, the clients frequently question why they need protection. We advise our clients that there's never certainty as to who may become an abuser, but those who are in a position of trust are all possible abusers, including caregivers and others who may develop relationships with them. Most clients respond they can take care of that. Yet, we find that our clients who were at one time at the top of their fields in business, now in their 80s, are succumbing to illness and diminished capacity and are being taken advantage of through financial exploitation.

Steps to take with clients. To avoid the potentially litigious effects of *Dunn*, attorneys can use other methods (aside from acting as trust protectors) to reduce their clients' risk of financial exploitation. At the first client-attorney meeting, most estate-planning attorneys request that their potential new client fill out a financial data sheet. In addition to completing this standard form, attorneys should request that clients identify any family history of Alzheimer's and dementia. The form should ask the client to state when his family member was diagnosed with the condition and how progressive the disease was. The attorney's client software should identify clients with a family history of Alzheimer's and dementia. Once identified, attorneys can be on the lookout for signs of diminished capacity, especially around the time that the client's other family members were diagnosed. The form should also ask whether the client is undergoing any treatment or is taking any medications that may affect his mental capacities. Such client should consider creating a panel of advisors and physicians (the Panel) to meet with periodically to evaluate him. The Panel could consist of two or more of a psychiatrist or psychologist, another physician (such as a geriatric physician, internist or cardiologist), one or more family members, an attorney who may or may not represent the client and the client's CPA.

Annually, the Panel could assess the client's mental capacity. If the client decides that he wishes to amend or rewrite his estate-planning documents, the client will have to appear before the Panel so that the Panel can assess the client's capacity and determine if the client should be permitted to make the requested change and/or bring an action to have a guardian appointed. Of course, each Panel member will want to be indemnified and held harmless for his actions, and some may want to be compensated. Using a Panel, reviewing the client's family history of Alzheimer's or dementia during the initial client conference and creating protective irrevocable trusts that limit the elder's ability to unilaterally

withdraw funds and/or change beneficiaries are just a few methods that attorneys can use to reduce their clients' risk of financial exploitation. Yet, based on *Dunn*, attorneys who provide creative options that aren't widely accepted or practiced (such as the requirements in *Dunn* to have the drafting attorney or a court approve a trust amendment or revocation) risk being subject to claims for public policy breaches and ethical violations. Thus, the enactment of laws addressing financial elder exploitation is necessary to benefit both elderly clients and those attorneys who make a good faith effort to initiate the types of measures described above to combat these problems before it's too late.

—This article is based on an earlier version of the same topic that was published in the Spring 2017 issue of ActionLine, *a Florida Bar Real Property, Probate & Trust Law Section publication.*

Endnotes

1. "What is Adult Abuse?" Florida Department of Children and Families (DCF), *www.myflfamilies.com/service-programs/adult-protective-services/what-is-adult-abuse*. *See also* Florida Statutes Section 825.103 (1).
2. Telephone conversation on Jan. 27, 2017 between the authors and the Adult Protective Investigations Division of Florida's DCF.
3. *Dunn v. Patterson*, 395 Ill. App.3d 914 (2009). Patterson was in litigation, declaratory and disciplinary, from April 27, 2007 to May 7, 2013.
4. *Ibid.*, at p. 915.
5. *Ibid.*, at p. 916.
6. *In re: Lawrence Francis Patterson*, Attorney Number 2153718, Case No. 08PR0074 (filed July 20, 2011), *www.iardc.org/rd_database/rulesdecisions.html*.
7. *Ibid.*, at p. 12.
8. *Supra* note 3, at p. 916.
9. *Ibid.*, at p. 917.
10. *Ibid.*
11. *Ibid.*, at p. 919.
12. *Ibid.*, at p. 925.
13. *Supra* note 6, at p. 30.
14. *Supra* note 3, at p. 914.
15. *Ibid.*, at p. 921.
16. *Ibid.*, at p. 922.
17. *Ibid.*, at p. 925.
18. *Supra* note 6.
19. The disciplinary action was filed on July 31, 2008. The declaratory action was ultimately resolved on Nov. 18, 2009.
20. *Supra* note 6, at p. 42.
21. *Ibid.*, at p. 34.
22. *Ibid.*
23. *Ibid.*, at p. 35.
24. *In re: Lawrence Francis Patterson*, Attorney Number 2153718, Case No. 08PR0074 (filed May 7, 2013), *www.iardc.org/rd_database/rulesdecisions.html*.
25. *Ibid.*, at p. 15.
26. *Ibid.*
27. *Ibid.*, at p. 16.
28. *Ibid.*
29. Financial Crimes Against the Elderly 2016 Legislation, National Conference of State Legislatures (2016), *www.ncsl.org/research/financial-services-and-commerce/financial-crimes-against-the-elderly-2016-legislation.aspx*.
30. R. Craig Harrison, "Protecting the Elderly From Financial Exploitation: The Dilemma and Solution, Part II," *Fla. B.J.* (July/August 2014), *www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/c0d731e03de9828d852574580042ae7a/445ef3f18dbdb84e85257d01005009b0!OpenDocument&Highlight=0,disability**.
31. Fla. Stat. Section 825.101(4).
32. Fla. Stat. Section 825.103(1).
33. *See Everett v. State*, 831 So.2d 738(2002); *Ellison v. State*, 983 So.2d 1205 (2008).
34. *Franke v. State*, 188 So.3d 886 (2016).
35. *Ibid.*, at p. 888.
36. *Ibid.*
37. *Ibid.*
38. *Ibid.*
39. *Ibid.*, at pp. 888-889.
40. *Ibid.*, at p. 888.
41. Elizabeth Olson, "Declaring War on Financial Abuse of Older People," *The New York Times* (April 14, 2017), *www.nytimes.com/2017/04/14/business/retirement/retirement-preventing-elder-abuse.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0*.
42. Elizabeth Olson, "Financial Abuse of the Elderly: Sometimes Unnoticed, Always Predatory," *The New York Times* (Nov. 28, 2015), *www.nytimes.com/2015/11/28/your-money/financial-abuse-of-the-elderly-sometimes-unnoticed-always-predatory.html*.
43. *Supra* note 41.
44. H.F. 3536, 89th Leg. Section 1 (2015-2016), *www.revisor.mn.gov/bills/text.php?number=HF3536&version=0&session=ls89&session_year=2016&session_number=0*.
45. *Ibid.*
46. S.B. 473 (2015), *www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0451-0500/sb_473_bill_20150428_amended_sen_v98.pdf*.
47. S.B. 8033 (2016), *www.nysenate.gov/legislation/bills/2015/S8033*.
48. S.B. 2564A (2015), *www.nysenate.gov/legislation/bills/2015/S2564*.