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PRACTICE AREA PROFILE: ELDER LAW

Remedies for elderly victims of undue influence

By Martin J. Hagan

Elder abuse is a serious problem in our society. While our health care system allows many people to live well into their 80s and even 90s, this same longevity can cause them to rely on others for help in managing their banking, investments and bill paying. With this dependency comes the risk that a caregiver will exploit the older person for their own advantage by means of undue influence.

As a form of elder abuse, undue influence can easily be hidden behind the mask of a “caring” relative or friend who has been entrusted with the property of a dependent older person who may still be competent but is too afraid or ashamed to complain of the abuse taking place.

If an attorney is asked to advise an older person who is the apparent victim of undue influence, what are the remedies that could be pursued?

A first step would be to gain an accurate understanding of the situation. If possible, the older person should be evaluated by a psychologist or other professional trained in elder abuse issues for an assessment of their vulnerability to exploitation. When interviewing the older person, the attorney should avoid accepting at face value their denial that any abuse has occurred when there is credible evidence to the contrary. Someone who is denying abuse may well be acting out of fear and intimidation, where such denials are consistent with the presence of undue influence.

Based on the results of this assessment, the next step would be to meet with the older person or their agent or guardian to devise a plan for pursuing one or more of the following remedies.

1. Break the Perpetrator’s Influence

An intervention could be made to break the influence of the perpetrator over the older person. For example:

- The older person could be physically removed from the isolating conditions that have bred the undue influence.
- Powers of attorney that have given the perpetrator authority over the older person’s assets could be revoked, and their names removed from any joint accounts.
- Trusted family members or other interested parties could be appointed as replacement agents or as trustees to protect and recover the older person’s assets.
- The limitation of this approach, however, is that there may be no one who is willing and able to assume such duties.



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Moreover, these actions may simply invite retaliation by the perpetrator who will go back and persuade the older person to revoke any new power of attorney and return control to them.

2. Report Abuse to Area Agency on Aging

Each Area Agency on Aging (AAA) office in Pennsylvania offers protective services for older adults (defined as those 60 years of age and older) who are the victims of neglect or physical, mental or financial abuse. Anyone having

reasonable cause can report alleged abuse to the AAA and receive anonymity. (The Allegheny County AAA’s phone number for reporting abuse is 412-350-6905.) Once a report is made, the AAA will investigate the allegations and if substantiated prepare a service plan for the older person. The plan may recommend pursuing civil or criminal remedies; however, the AAA itself has no authority to take legal action against the perpetrator.

3. Contact Police and State Prosecutors

Apart from filing a report with the AAA, evidence of the theft of an older person’s cash or other property could be taken to the police, who in turn could refer the case to the District Attorney or the state Attorney General’s Office. (Note that in 2021 Pennsylvania added Section 3922.1 to the Crimes Code at 18 Pa. C.S. § 3922.1, which specifically criminalizes the financial exploitation of older adults. The statute also gives the Attorney General’s Office the authority to prosecute such cases when the amount involved exceeds \$20,000.)

4. Bring Civil Action Against Perpetrator

Apart from criminal prosecution, a civil action could be brought on the grounds of undue influence and possibly misrepresentation and fraud. The plaintiff in such an action would be the older person themselves, their agent acting under a durable power of attorney that authorizes the agent to pursue claims and litigation, or the Guardian of their Estate. After the older person’s death, the plaintiff would be the personal representative of their estate.

The potential defendants in such an action would start with the perpetrator(s), but could also include their employer if the facts show that:

- The exploitation occurred during the course and within the scope of the perpetrator’s employment, or

- The employer acted negligently or recklessly in supervising and regulating the activities of its employee.

The types of relief that could be sought in such a case could include one or more of the following:

- Request for an accounting
- Demand for the return of assets and setting aside of conveyances
- Request for an injunction “freezing” the bank accounts in which the victim’s money has been placed, pending the outcome of the litigation
- Imposition of a constructive trust
- Demand for money damages, attorney’s fees, and costs

Finally, be aware that special burden-of-proof rules apply in the trial of an undue influence case. They are discussed in James F. Mannion, *The Presumption of Undue Influence and the Shifting Burden of Proof*, 18 Fiduc. Rep. 2d 348. ■

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