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PERSPECTIVE

Financial elder abuse claims in the COVID-19 environment

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In this COVID-19 environment, elders are especially vulnerable to financial abuse due to the inherent nature of the shelter-in-place restrictions imposed by the government and the need to rely on caretakers, family members and acquaintances for daily sustenance. Vulnerable elders may be isolated by perpetrators with increased opportunity to remotely orchestrate changes to estate plans.

There are existing remedies through the assistance of specialized counsel for caring family members and friends to address this endemic.

California Financial Elder Abuse Law

In 1982, California enacted the Elder Abuse and Dependent Adult Civil Protection Act, set forth in the Welfare and Institutions Code Section 15600, et seq., to protect vulnerable elders from abuse. California has updated the law on an ongoing basis to protect its growing population of elders.

The law provides financial elder abuse occurs when a perpetrator, “[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.”

Specifically, financial elder abuse includes common vari-

ety theft like misappropriating funds from an elder’s bank account. However, financial elder abuse is more often an evolving sequence of discrete psychological and emotional acts to manufacture a perpetrator’s intended result. California identi-

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fied this problem. Accordingly, the law broadly defines elder abuse to include undue influence that deprives an elder of his or her property rights.

A common mechanism for financial elder abuse through undue influence is a perpetrator wrongfully causing an elder to change their estate plan, like a living trust, to include the perpetrator as a trustee, trust protector, holder of a power of attorney, or beneficiary. This is a favored tactic of elder abusers because the purported trust is typically not discovered many years later until the elder’s death, when it is more difficult to prove the elder’s intentions and vulnerabilities. Often the alleged perpetrator claims to have no knowledge about the elder’s estate planning decisions. While the perpetrator

would not receive any interest until the elder’s death, the law provides that the “taking” which constitutes financial elder abuse occurs when the perpetrator unduly influenced the elder to change his or her trust. This subtle, schematic nature of

bers, caretakers, friends or neighbors. Initially, the person with access may have genuine intentions to assist or provide companionship. However, over time, these persons with access may start to feel entitled if they, rather than the elder’s chosen beneficiaries, are the ones taking care of the elder. This feeling of entitlement can be the toxic ingredient to turn an initially sincere relationship into a scheme to unduly influence the elder to change his or her trust in favor of the person with access to the elder.

During this pandemic, many elders who otherwise may have been partially independent are now relegated at home in reliance on others for assistance with simple necessities of life.

Also, with social distancing, it becomes more difficult for family members to notice “red flags” regarding isolation and controlling an elder. Under usual circumstances, a family member may find it unnatural that he or she is blocked access to visit the elder. However, during this pandemic, the family member may not attempt to visit or may not question isolation in adherence with government guidelines. A family member ordinarily may also find it suspicious if an elder’s doctors suddenly change. However, during this pandemic, a perpetrator could claim the elder needed to see a new doctor through video conferencing, coincidentally chosen by the

financial elder abuse can be exacerbated during this pandemic.

Increased Risks of Financial Elder Abuse While Elders Are Isolated During COVID-19

Starting March 19, California issued an ordinance requiring the closure of all non-essential businesses and requiring its citizens to shelter-in-place. Recently, California extended these requirements to May 15, and possibly further.

An unintended consequence of the shelter-in-place requirements is that it provides perpetrators a legitimate opportunity to isolate elders and control their necessities. The perpetrators of financial abuse can be anyone who has access to the elder, including family mem-

perpetrator. “Red flags” that would typically cause a family member to question the perpetrator may seem like regular behavior during the pandemic.

Accordingly, the social distancing protocol necessary to avert a health crisis may unintentionally increase financial elder abuse by isolating dependent elders with potential perpetrators.

Increased Risk to Influence Estate Planning Documents

A safeguard to financial elder abuse is preparing estate planning documents through experienced attorneys. A qualified attorney generally meets personally with the elder to discuss desired estate planning changes. Depending on the elder’s age and vulnerabilities, a prudent estate planning attorney reviews whether the elder has the requisite capacity and is free of undue influence to make the requested changes. This safeguard is not absolute, as sophisticated financial elder abuse may go unnoticed even to a seasoned estate planning attorney. However, it is an effective safeguard nonetheless that reduces incidents of financial elder abuse.

During this pandemic, attorneys and other professionals have been meeting with their clients remotely via telephone or video conferencing. When meeting remotely rather than in-person, attorneys cannot simply close the conference room door to speak privately with their client. It provides opportunities for perpetrators to control an elder’s calls and emails to attorneys while the perpetrator listens from around

the corner or stands behind the camera, unbeknownst to the attorney. Perpetrators may also filter and control emails between the elder and the elder’s attorney, such as drafts of estate planning documents. It provides perpetrators an opportunity to create a record in an attorney’s file of an elder’s purported intent.

This creates a perverse opportunity for perpetrators during this pandemic to change an elder’s estate plan remotely with an attorney, knowing that it would be more difficult to later challenge a change prepared through counsel.

Preventing Financial Elder Abuse

Given the described challenges, there are steps to avoid financial elder abuse, particularly in this climate.

Perpetrators have less opportunity to consider improper conduct if they know family members or friends are actively involved and interested in the elder. Family members should remain in regular contact with elders through available means while adhering to the social isolation protocols. This may include more phone calls or video conferencing calls, in place of personal visits. While in contact, family members should express an interest in the elder’s daily activities, such as doctor appointments, in an effort to spot “red flags.” Also, family members should maintain in contact with trusted persons who have access to the elder who can safely check on the elder.

Attorneys whom elders or

their representatives remotely contact during this pandemic should exert caution to identify potential undue influence. If an elder, or particularly someone on behalf of the elder, seeks to significantly change the dispositive provisions of the elder’s estate plan, the attorney should thoroughly review and confirm the elder’s intentions. In some instances, it may be necessary to personally meet with the elder, if safely possible through social distancing, before the change is formalized.

If family members are concerned an elder may be victim to financial abuse, they should contact appropriate counsel to discuss recourse. An appropriate specialist can identify the subtle nature of financial abuse to efficiently and aggressively prevent or mitigate abuse. After identifying potential issues through counsel, parties may agree on parameters for access and care for an elder that prevents the opportunity for abuse. In some circumstances, counsel may initiate a conservatorship to take formal legal steps to protect a vulnerable adult, often stopping perpetrators in their tracks. Prompt legal action increases the prospects of preventing, reversing, or minimizing harm while the elder remains alive.

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Concerned persons may also contact Adult Protective Services or the authorities.

Last, if family members discover abuse following the elder’s death, such as receiving a copy of a new trust in favor of the perpetrator, they should promptly contact an attorney. Specializing counsel can identify potential abuse and effective recourse.

Recourse may include filing a petition for financial elder abuse seeking tailored damages, which, if successful, would require perpetrators to compensate the elder’s successors and pay their attorney’s fees, and potentially significant punitive or double damages.

Conclusion

Vulnerable elders are at an increased risk for financial elder abuse while isolated and dependent on others during the required COVID-19 shelter-in-place order. Perpetrators may find new opportunity to unduly influence these isolated elders, particularly by attempting to remotely solicit changes to elders’ estate plans. Family members and friends should remain in regular contact with elders, and should seek specialized legal assistance if they become concerned that an elder may be a victim of financial elder abuse. ■

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