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Case Study

Protecting the Vulnerable: Free Ways to Prevent Financial Exploitation

by Christopher Desimone, Attorney at Law

Educational Objectives

1. Relate recurring patterns of perpetrators who exploit older adults.
2. Describe no-cost actions to protect assets from financial exploitation.
3. Explain differences among types of power of attorney.

Background

Providers, educators, health care professionals, family members, older adults, and others are witnessing troubling increases in the exploitation of our most vulnerable citizens. And the worst is yet to come. There are two primary reasons for the dramatic growth in the exploitation of older adults. First, the growing prevalence of Alzheimer's Disease and dementia-related disorders has resulted in a spectrum of stages regarding capacity, and these various stages have become a breeding ground for mischief. Second, we are currently in the midst of the largest wealth transfer in the history of the nation. This combination is a recipe for massive financial exploitation.

Steps to Prevent Financial Exploitation

The good news is that protecting older adults from financial exploitation is manageable if one knows the steps to take. Here are seven simple and free steps:

1. <u>Use Direct Deposit/Debit</u>. Setting up direct deposits and debits to manage financial transactions will ensure that an older adult's bills are paid on time, even if the individual is unable to write checks. This practice also substantially reduces the chances of various types of theft, including mail theft. More importantly, direct deposits and debits act as a tracing mechanism in the event records need to be reconstructed, and help prevent opportunities for exploitation. And it is free.

Many of us working with older adults in years past likely witnessed the grandmother who would sign her Social Security check, or the like, and hand it to her grandson for deposit into her bank account. He would dutifully travel to the bank to make the deposit. Today, that grandson, because of his own financial circumstances, may feel compelled to place the signed check into his own account. Many months may pass before his aging grandmother, or another family member, discovers this. Will his grandmother insist on prosecuting her grandson when it is discovered? Of course not. Simple direct deposit and debit can prevent temptation and keep a clear record.

2. <u>Never Make Checks Payable to Cash</u>. Perpetrators of financial exploitation follow recurring patterns. Under Virginia Code Section 63.2–1606, bank employees are permitted to report suspected exploitation to the authorities, and making checks payable to "cash" is one of the most common reasons.

In a recent case where a substantial number of checks were made payable to "cash," I spoke with the older adult's caregivers and quickly

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realized they were structuring compensation this way because they were receiving Social Security disability payments and could only have limited additional income. Many types of government benefit programs are income-based, such that disability benefits would have been reduced substantially if there were extra income. After I informed these caregivers that failure to claim the income could be income tax evasion, they changed their story and stated that all income was being reported. In response, I informed them that, if this were the case, they were committing Social Security fraud since they were not disclosing the compensation. I said that they could "pick their poison." There are very few reasons for ever making checks payable to "cash." It is always a red flag.

3. Avoid Jointly Owned Bank Accounts. One of the most common ways to increase the potential for financial exploitation is to have jointly owned bank accounts. For example, if Mom places Son's name as a co-owner of her bank account, it doesn't protect the money in any way. There is nothing whatsoever that prevents the mother from signing checks or distributing money to whomever she wants without the joint status.

Jointly owned bank accounts actually put the money at greater risk, not only because Son has complete and unfettered access to the money, but because Mom is thereafter subject to all of her son's potential liabilities. If Son gets into a car accident or any other type of lawsuit, including a divorce, has creditor or bankruptcy problems or too many medical bills, then Mom stands to lose her money, because she added her son's name onto her account. Adding an individual on a financial or bank account can do much more harm than good.

4. Ensure the Power of Attorney Says What It Should. There are generally two types of powers of attorney. The first is a medical power of attorney in accordance with an advance medical directive. The second is a financial power of attorney that allows a designated person (called an "Agent") to act on behalf of another for financial matters.

There are countless times a family member, while firmly clutching a power of attorney in her hands, will ask how it came to be that their uncle just signed away the deed to his house to the least favorite cousin, while lying in a hospital bed. The answer is simple: a power of attorney does not itself prevent an older person from signing a check or document or deed. What is more important is whether the financial power of attorney authorizes the Agent to take the necessary steps to protect the assets, and whether the Agent took those steps.

5. Choose The Right Fiduciary. Properly protecting assets from financial exploitation begins by choosing the right fiduciary. A "fiduciary" is someone who has a legal duty to act in the best interest of another. An Agent under a financial power of attorney, or a Trustee of a Trust, is an example of a fiduciary.

I assert that 99% of all types of exploitation are preventable if the right fiduciary is chosen. I have always found it fascinating when I listen to older adults take such pride in never allowing an electrician or plumber to "set one foot in their house unless they are licensed, bonded and insured." And although there is certainly plenty of merit in this mantra, the irony is that, while they subject their plumber to a reasonable standard, they do not do the same for their own fiduciary, who is responsible for protecting everything they own. Choosing the right person as the fiduciary can result in the protection of an older adult's entire life savings. Or do serious damage.

6. Examine Tax Returns and Credit Reports. An older adult's individual income tax return can provide a wealth of information and is an overlooked tool. If you suspect an older adult may have been a victim of financial exploitation, Schedule B on IRS Form 1040 is a great place to start. Interest and dividends are reported on Schedule B, so it is easy to compare information from the current year to prior years in order to determine if there are any irregularities or unusual asset depletion. In addition, credit reports can contain a treasure trove of information regarding transactions and financial activities undertaken in the name of an older adult. Credit reporting agencies typically allow a free report.

7. Take Action Before Incapacity. The more an older adult plans ahead, the more secure he or she will be from financial exploitation. Every older adult has a current range of decision-making ability, but that same ability is not guaranteed tomorrow. It is obvious that the time to set plans in place is now.

Using legal documents to set forth financial arrangements will prevent misunderstandings and abuse; without these documents in place, opportunities to resolve such issues become severely restricted.

Case Study #1: The Nice Neighbor

Mr. and Mrs. Brown were married for more than 60 years. They lived in a small town in the Blue Ridge Mountains. They had no children. They owned a small house and a checking account. Mr. Brown died one year ago. Mrs. Brown is 90 years old. Shortly after Mr. Brown died, Ted, a 67-year-old neighbor who lived a few blocks away, volunteered to come and fix her porch. Mrs. Brown made him some lemonade. They went out for lunch.

Mrs. Brown started spending more time with Ted. I started to receive phone calls from a concerned neighbor and a financial advisor. What would you do in this case based on these facts? I know some would say "call the authorities." Sounds reasonable, right?

Protecting assets is similar to a complex chess match; it is important to understand how each piece on the board can move, but also how to make the right "sequence" of moves. Anticipating the sequencing strategy, more than anything else, ultimately determines whether or not assets are protected. Keep in mind that the primary goal here is to make sure that Mrs. Brown and her assets are not separated. Despite the chess analogy, it is not a game, and it is critically important that older adults in our communities have funds available to care for themselves when necessary.

Let's start with a basic notion that Ted is up to no good. This may be incorrect, but I believed this was true based not so much on any concrete evidence but rather on my "gut" experience in dealing with these situations. And Mrs. Brown's friends and neighbors seemed to agree. So did I call the authorities and report Ted? No, of course not. Because if you look five or six "chess" moves ahead of Ted, you will realize that this particular move can backfire, sometimes badly, and substantially jeopardize the overall mission.

Set aside the fact that a 90-year-old woman, particularly in that small town, may not take kindly to having the "government" involved. Set aside the fact that Mrs. Brown may ostracize her neighbor, friend, advisor or attorney if she believes they have initiated what she considers an intrusive and unnecessary process. In fact, Ted did nothing wrong at all. He was simply a neighbor who fixed a porch and established a close relationship with Mrs. Brown. Ted had not taken a penny from Mrs. Brown.

Had I acted precipitously, Mrs. Brown would have been furious and insulted, driving her directly into the waiting arms of the very person that we distrusted the most, Ted. Fortunately, Mr. and Mrs. Brown had appointed me as their fiduciary, so I thought the better first move would be to send the fiduciary documentation to her bank and request duplicate statements. It took a total of two minutes to send this request and there was no cost to it. I received a copy of the bank statement the following month. It showed no misconduct by Ted. After eight months went by, I had to face the fact that perhaps my gut was wrong in this case.

The following month, however, I opened a copy of Mrs. Brown's bank statement to find enormous amounts of activity and transactions, including new credit cards linked to the account under Ted's name, direct debits on his behalf for his expenses, etc. When he thought no one was watching, he had hit the account hard. Sometimes the chess match calls for immediate action. Sometimes it calls for patience. In this case, it was only the latter that prevented Ted from having free reign on Mrs. Brown's checking account. I got into my car and drove to that town, and confronted Ted face-to-face. With documentary evidence, we were able to undo everything Ted had done and to show proof to Mrs. Brown, as well. Mrs. Brown's assets were protected, and Ted was out of the picture.

Case Study #2: The Fox Guarding the Henhouse

Mr. Black loved his wife dearly since the day they met. They had two daughters, although neither had a close relationship with their parents. Mrs. Black died two years ago. Immediately following her death, the eldest daughter, Barbara, came back into town. Mr. Black named Barbara as his Agent under his medical power of attorney. Because he was very vocal about his desire to remain in his home, Barbara hired a caregiver from a reputable home health care agency to assist him. All was well for several months. Or so everyone thought.

Mr. Black's health continued to decline. Barbara began showing glimpses of a controlling, impulsive behavior. She became extremely close to the caregiver and together they regulated everything about Mr. Black, including contact with others. One day I received a phone call from Mr. Black's financial advisor informing me that Mr. Black kept requesting telephonically more money to be transferred out of his brokerage account and into his personal bank account, seemingly at the direction of his daughter. Keep in mind that there is nothing wrong with Mr. Black transferring funds between his accounts. Nor is there anything wrong with a devoted daughter's helping her father with such requests.

In addition, whether or not an older adult has legal capacity to manage his or her affairs is determined by a professional medical evaluation. In this case, despite my suggestions to the daughter, she would have none of it. The controlling caregiver echoed the same sentiment. Worse, she was appointed as the medical power of attorney and had the formal legal right to do exactly what she was doing and block everything I was attempting to do.

The conundrum was that I could not fully piece together the financial puzzle without Barbara agreeing to have a geriatric care physician evaluate Mr. Black. And no one was alleging Mr. Black was incapacitated or abused in any way. Although there was no proof to the contrary, my gut told me something was amiss.

Typically, I would have been powerless to take any meaningful action, but Mr. and Mrs. Black had previously appointed me as their fiduciary. It was quickly obvious that the sequencing strategy in this "chess match" would be critical. The mission here was not only to protect Mr. Black's money, but also to ensure that he live in peace in his home.

What would you do under these circumstances?

In this case, there was one, and only one, move: follow the money. It is important to understand how financial institutions operate. There are entities known as compliance divisions within brokerage houses that are very sensitive to matters regarding potential coercion of customers. As Mr. Black's fiduciary, I requested the ceasing of transfers out of Mr. Black's brokerage account, based on the concerns that the investment broker had initially raised. I then immediately contacted Barbara and informed her that if she permitted a geriatric care physician to examine Mr. Black, then either (1) unlimited transfers would resume, if Mr. Black had capacity; or (2) if Mr. Black did not have capacity, then transfers could still resume so long as they went through the fiduciary.

Barbara clearly understood that the financial well was dried up. So she relented. The geriatric care physician examined Mr. Black despite overt animosity from both from the daughter and the caregiver, with the latter attempting at one point to cut the evaluation short and remove the physician.

The physician completed the examination and stated in his report that Mr. Black should no longer manage his own financial affairs because he lacked sufficient capacity.

This step allowed me to request from the brokerage account something known as "tracers." Tracers are very effective in locating precisely the origin and destination of financial transactions. This took all of three minutes to request and there was no cost involved. After tracing the account transactions, it turned out that $250,000 was transferred from Mr. Black's brokerage account to his bank checking account. So I then forwarded the fiduciary documentation to the bank branch where all the money had been sent. I learned that Mr. Black had only $10,000 left in his checking account.

An account analysis revealed that $135,000 was spent on his round-the-clock care and other expenses. The remaining $105,000 was slowly transferred out of the checking account through credit card cash transfers on a near daily basis, month after month. It became apparent that Barbara had been siphoning money from her father, in such a way that no one would know.

I acknowledge that many might expect the next step would be to report this to the authorities. It was, after all, a clear case of theft, right?

Not so fast. As a former prosecutor, I can assure you that this case involving financial transactions is not as clear cut as it seems. For example, there was certainly no impropriety in Mr. Black's transferring his brokerage account into his bank account, nor with Mr. Black's linking a credit card in his name (or even his daughter's, for that matter) to his bank account. Can't a doting father hand his credit card to his daughter and request that she use the funds for herself since she was in financial hardship?

I knew the daughter would claim that she had that specific authority, and that the caregiver would corroborate her story. In fact, Mr. Black loved his daughter and would not cooperate in any action taken against his daughter.
I acknowledge that many of us who devote ourselves to protecting older adults are often dismayed by the lack of prosecutions in this arena, but the hard truth is that it can be extremely difficult, particularly where family members are involved. Would calling the authorities accomplish the mission of protecting Mr. Black's assets or his living in peace in his home? No.

Instead, I called Barbara. She came to my office and we sat down together.

With a large, detailed transaction history sitting next to me, Barbara buried her head in her arms, sobbed, and told me everything, including her severe financial predicament. Keep in mind that my client in all of this is Mr. Black, and only Mr. Black. My duty is to him, so I did what I thought he would have wanted: we resolved the issues. Barbara agreed (1) to have no connection whatsoever to any of Mr. Black's money; (2) to forfeit her share of the inheritance, an amount that would have been greater than what she had received through her "theft"; and (3) to immediately replace the caregiver. She called the next day to tell me she also felt compelled to personally tell her father everything that she did. Over the following six months, however, something extraordinary happened. The entire family became much closer. Not only were they all spending time together, including Barbara's sister, but Barbara began caring for her father herself and saving a substantial amount of money for him in doing so.

When I met with Mr. Black recently, he was extremely lucid and well-cared for; we talked in detail about his finances and other matters. At the end of our conversation, he leaned over and said "I want you to know that you did the right thing with Barbara. You did exactly what I would've done. Somehow, my family has become close again and we hadn't been for a long time." He is still at home and lives in peace.

Conclusion

Good planning protects everything an older adult owns and, by extension, everyone they love. But make no mistake: the proper steps must be taken, and in the right order, to prevent exploitation.

Study Questions

1. What no-cost actions can you take to help prevent financial exploitation?
2. Are there times when the actions you are about to undertake may hurt rather than help the mission?
3. What are the benefits of having power of attorney?

Recommended Resources

Dementia State Plan: *Virginia's Response to the Needs of Individuals with Dementia and their Caregivers.* (December 2011). Alzheimer's Disease and Related Disorders Commission, Department for the Aging, Commonwealth of Virginia. http://act.alz.org/site/DocServer/VAStatePlan.pdf?docID=18441

Virginia Department for Aging and Rehabilitative Services. (800) 522-5019; TTY (800) 464-9950; www.vadrs.org

About the Author

Chris is President of Anderson, Desimone & Green, PC, an estate and elder law firm with offices in Roanoke, Blacksburg, and Smith Mountain Lake. Chris completed advanced fiduciary training at the Center for Fiduciary Studies. Contact him at Chris@andersondesimone.com.