

# **Financial Exploitation of the Elderly**

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# FINANCIAL EXPLOITATION OF THE ELDERLY

- The illegal or improper use of an elder's funds, property or assets
- Financial exploitation of the elderly is more common than physical abuse
- The elderly include individuals over 60 years of age

# THE ELDERLY ARE EASY TARGETS

- The elderly often live alone
- Suffer from dementia and other cognitive impairments
- The elderly are trusting
- They have physical limitations
- They may be technologically challenged
- They are easy targets

## PERPETRATORS OF FINANCIAL ELDER ABUSE ARE OFTEN CLOSE TO HOME

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- Family members
- Individuals with a fiduciary relationship
- There is a heightened duty of care
- Common mindset: “It’s my money” anyways

# FIDUCIARY RELATIONSHIPS

- There often exists a fiduciary relationship between the perpetrator and the elderly victim
- New Hampshire: A fiduciary relationship is a comprehensive term and exists whenever influence has been acquired and abused or confidence has been reposed and betrayed
- “A confidential relationship exists between two persons when one has gained the confidence of the other and purports to act or advise with the other’s interests in mind”
- Fiduciaries include family members, caregivers, friends
- A fiduciary is bound to a higher standard: A duty to act in the best interest of the individual, with no self-dealing
- A fiduciary relationship may affect the burden of proof in certain cases – constructive trust analysis



# POWER OF ATTORNEY DOCUMENTS

- **POA Documents can provide extensive powers**
- **Is it a license to steal?**
- **There is no automatic court oversight**

## CHALLENGING AN AGENT UNDER A POWER OF ATTORNEY DOCUMENT

- RSA 506:7 provides available remedies
- Actions of an agent may be challenged in the probate division or superior court
- A petition can be filed by the principal, principal's spouse, child, parent, those who might take property, anyone named in a principal's will, healthcare providers, department of justice, department of health and human services, county attorney, or, in some cases, "any other interested party"

## PURPOSES UNDER RSA 506:7 - CHALLENGING AN AGENT

- To compel an accounting (Agent must be provided 60 days to provide a written accounting before filing a petition)
- To determine the legality of certain acts or proposed acts
- To challenge and terminate the power of attorney document – violation of fiduciary duties
- To determine if gifts or transactions are authorized. Court may look at intent, history of gift making, estate plan, impact of the proposed gift, tax consequences of the gift, etc.



- In a Petition under RSA 506:7, the court may hold hearings, issue injunctions, and make other orders that are needed
- Payment of attorneys' fees: The statute allows for the award of attorneys' fees against the agent if the court determines the agent has violated fiduciary duties or failed without any reasonable cause or justification to submit accounts or reports after written request

# GUARDIANSHIP: OVER THE PERSON OR THE ESTATE OR BOTH

The court must find:

- The proposed ward is incapacitated
- Guardianship is necessary for care, supervision, and rehabilitation or management of financial affairs
- There are no available alternative resources which are suitable
- The guardianship is the least restrictive form of intervention consistent with preservation of civil rights and liberties
- Functional limitations: The court will focus on the nature and extent of the functional limitations of the proposed ward – whether the ward has capacity to care for self and estate

# INCAPACITATED

- Incapacity is a legal not a medical disability – that the proposed ward has suffered, is suffering, or is likely to suffer substantial harm due to an inability to manage his or her property or financial affairs
- No need for expert medical testimony
- Medical testimony can be valuable and persuasive

# AVAILABLE ALTERNATIVE RESOURCES

The court will look at alternatives to guardianship including:

- Visiting nurses
- Homemakers
- Home health aides
- Adult daycare
- Multi-purpose senior citizen centers
- Powers of attorney, etc.

# LEAST RESTRICTIVE FORM OF INTERVENTION

- The court will seek to ensure that any guardianship imposed on the ward represents only those limitations necessary to provide needed care and rehabilitative services
- The ward should enjoy the greatest amount of personal freedom and civil liberties consistent with mental and physical limitations



## PROCEDURE AND HEARING

- Petition must include detailed statement of facts showing necessity for a guardian
- Must include specific allegations regarding financial transactions, inability to manage estate, inability to provide for personal needs, food, clothing, etc.
- The proposed ward has a right to legal counsel
- Payment of costs, expenses, and counsel fees for the petitioner:
  - May come from assets of the ward if:
    - (a) the court has granted the petition;
    - (b) the award of costs and fees from assets of the ward will not cause undue financial hardship; and
    - (c) costs of legal fees are reasonable and were necessary to protect the ward

## REMOVAL OF GUARDIAN

- Guardianship may be terminated by the court when removal is in the best interest of the ward
- A final accounting may be ordered
- Removal terminates a guardian's authority, but does not release guardian from acts or omissions during the guardian's appointment
- Bond – a bond may be used to set aside any judgment against a guardian for wrong-doing or financial exploitation

## DUTIES OF A GUARDIAN

- A guardian is bound to exercise at least that ordinary diligence which is applied to the common affairs of life
- A guardian is prohibited from acting for his or her own benefit in relation to the ward's property
- Person:
  - Guardian over the person has power of custody and to establish the ward's place of abode
  - Responsible for ward's care, comfort, and maintenance, education and rehabilitation
  - Authority to provide medical care if allowed by court
  - Must act in a manner that protects the ward's civil rights and restricts freedom only as necessary
  - Annual report required

# DUTIES OF A GUARDIAN

- Estate:
  - Possession of the ward's real and personal property – must protect and preserve these assets
  - Annual accounting required

## GUARDIANSHIP HEARING

- Court will inquire into nature and extent of the functional limitations
- Court will ascertain proposed ward's capacity to care for self and estate
- Proposed ward must attend hearing if able, unless excused by the court – including a physician's affidavit that proposed ward may suffer harm or has no ability to understand proceedings



# CONSERVATORSHIP

- Voluntary petition
- Application to the court for appointment of a conservator to manage property if unfit by reason of mental or physical disability
- Hearing:
  - Nominated conservator must attend
  - Court must find the conservator voluntarily applied for appointment of a conservator
  - Court must find individual voluntarily chose the nominated conservator
  - The court may for good cause nominate another person as conservator, and with approval of the ward, appoint that individual
- A bond will be required
- Duties are similar to those of a guardian over the estate – an annual account is required

# WILL CONTEST ACTIONS

- Difficult cases
- Lead witness cannot testify
- Policy – we want the estate planning documents to govern
- Medical records are key
- Need for expert witnesses?
- Trust docket

# LACK OF CAPACITY

- RSA 551:1 provides that only persons of “sane mind” may make a valid will
- Testamentary capacity at the time of execution is defined as:
  - A. Able to understand nature of the act of execution
  - B. Must recall property and its general nature
  - C. Must have in mind those who are relatives – the natural objects of affection
  - D. Must be able to elect and choose the disposition of property
- The “lucid interval”
- Witnesses with knowledge and observation of testator may testify to opinions of sanity, even though not experts

# UNDUE INFLUENCE

- Need diminished capacity
- Alleged influence must amount to force and coercion that alters the donor's will and must be more than mere influence of affection
- Undue influence subjugates the mind of the testator to that of the person seeking to control it, thereby destroying the free agency of the testator at the time the will is made
- Undue influence by direct proof or it may be inferred from circumstances
- Quality of testator's mind is relevant: person of strong mind is not easily influenced

## BURDEN OF PROOF IN WILL CONTEST CASES

- The executor/proponent of the will carries the burden
- Presumption of capacity and lack of undue influence
- Challenger can rebut these presumptions with sufficient evidence
- Burden to prove capacity and lack of undue influence then remains with the proponent
- Fiduciary relationship: wrongdoer carries the burden



# PETITION TO PROVE WILL

- RSA 552:18 provides that an individual may commence a judicial proceeding to determine the validity of a will
  - Must reside in New Hampshire or own real estate in New Hampshire
  - Proceedings may not be commenced by a guardian, conservator, or attorney-in-fact
  - “Interested parties” must be provided notice
  - Interested parties include spouse, individuals who would be petitioner’s heirs, legatees, and devisees under the proposed will, executor of the will, charitable organizations in the will – director of charitable trusts and other “interested parties”

# PETITION TO PROVE WILL

- Proponent of the will has same burdens of proof and presumptions as if it were being proven after death
- If approved by the court, it is conclusive

# CIRCUIT COURT (PROBATE DIVISION) RULE 96-A

- The original will sought to be validated shall accompany the petition
- The court shall hold a hearing within a thirty (30) days
- The Court shall cause notice of hearing to be sent to all interested parties

# PETITION TO PROVE TRUST

- RSA 564-B:4-406 provides language similar to RSA 552:18
- It provides for some additional “interested parties”
- Presumably any burdens and presumptions would apply to this procedure just as to a challenge to a trust after death
- There is no thirty (30) day requirement of a hearing, as with the will hearing
- Questions that remain:
  - May discovery be taken by any interested party?
  - Medical records of the testator?
  - Is the drafting attorney’s file fair game?
  - Discovery within thirty (30) days?