

Financial Abuse of the Dependent Elder: A Lawyer's Ethical Obligations

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I. Introduction

As America ages, Baby Boomers experience stress as they become responsible for their aging parents. Those in “the Sandwich Generation,” i.e., those caring for their aging parents while supporting their own children, are also stressed by the financial and time pressures related to caregiving. The Pew Foundation reports that nearly half (47%) of adults in their forties and fifties have a parent age sixty-five or older and are either raising a young child or financially supporting a grown child (age eighteen or older). About one-in-seven middle-aged adults (15%) is providing financial support to both an aging parent and a child.¹ Many American seniors reside in nursing homes or other facilities. No matter where a senior resides, he or she may be subject to an ever increasing amount of elder abuse, including physical abuse, sexual abuse, emotional or psychological abuse, neglect, abandonment, and financial abuse. This article will address only one type of elder abuse—financial abuse, which may be abuse of a power of attorney given to a third party, either a court-appointed conservator or, more informally, a family member or another type described below. However, if an attorney consulting with a senior or family members detects signs of other kinds of abuse, the attorney may provide resources to help with those issues.²

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1. Kim Parker & Eileen Patton, *The Sandwich Generation: Rising Financial Burdens for Middle-Aged Americans*, PEW RESEARCH CENTER: SOCIAL AND DEMOGRAPHIC TRENDS (Jan. 30, 2013), available at <http://www.pewsocialtrends.org/2013/01/30/the-sandwich-generation/>.

2. The Department of Health and Human Services maintains a website in collaboration with the National Center on Elder Abuse and the Administration on Aging. Many resources are

Lawyers need to develop an appreciation for the ways in which their services may be used by an elderly person's family member or caregiver as a means of financial abuse. Often, a lawyer may be asked to draft a document or documents that provide an elderly person's family member or caregiver with an opportunity to strip a vulnerable elderly person of his or her possessions, including money, real estate, intangibles, and other property.

II. Lessons from *Astor* Case

A notorious case of financial abuse involved Mrs. Brooke Astor. Millions were stripped from her estate by her son, Anthony, who sought relentlessly to obtain a far greater share of his mother's immense estate than she had given him. That case ended, after years of litigation including criminal prosecution and appeals, when Anthony Astor and Francis Morrissey, the lawyer who assisted him, were sent to prison. The ABA published an interview with Alex Forger, the expert witness for the prosecution, which was conducted by Lori A. Stiegel, Senior Attorney of the ABA Commission on Law and Aging. This document is a compelling read. It is also instructive for lawyers who draft durable powers of attorney documents, wills, trusts, and codicils for the vulnerable elderly.³

The *Astor* interview alerts lawyers to overreaching by family caregivers who seek control over the property, finances, and/or manner in which an estate is to be distributed. I've seen it happen. If you draft durable-power-of-attorney documents, land contracts, and/or deeds, wills, and other testamentary documents, you have likely also experienced this. Here is a typical scenario:

Your office receives a telephone call from a prospective client. Your staff may do a brief intake, but likely you end up seeing the prospective client without advance warning that you, the lawyer, have a problem. "Mom" has been brought to the appointment by her son, "Bob," one of her adult children. Bob does all the talking. You soon get the jist of the request. You are being asked to draft a quit claim deed conveying the family farm to Mom and Bob as joint tenants with full rights of survivorship. You ask a few more probing questions to learn whether Bob and Mom live together, whether he is her primary caregiver, whether there are other children, whether Mom has a Will and/or a Trust, etc. Likely, the answers to these questions make you cautious.

Query: What do you do now? Here is a brief outline of a process recommended by the American Bar Association's Commission on Law and Aging:

available on that website to assist family caregivers with issues related to caregiving. Elder abuse resources will be found on this webpage: http://www.ncea.aoa.gov/FAQ/Type_Abuse/index.aspx.

3. See "The Brooke Astor Case: An Appalling Set of Circumstances," on the web page of the ABA Commission on Law and Aging, available at http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html#brookeastor.

- a. Identify the client. In this case, it is obvious that Mom is the client, even if she will not be paying the bill.
- b. Communicate to Mom and Bob that Mom is the client.
- c. Make sure that you hand Mom a fee agreement in which she is identified as the client.
- d. Communicate to Mom and Bob that you cannot represent both persons because that would constitute a conflict of interest.
- e. Then explain to Mom and Bob that confidentiality is the hallmark of the attorney/client relationship. Ask Bob to sit in the waiting room.

Bob wants to know why he cannot participate in your conference with Mom. You might provide Bob with an American Bar Association pamphlet entitled “Why Am I Left in the Waiting Room?: Understanding the Four C’s of Elder Law Ethics.”⁴

Query: What do you do next?

In order to execute a contract, a transfer of title, a will, a testamentary trust, or a durable power of attorney, the client must be competent. How do you determine competency? Some indicia of competency are that the person knows who her children—her natural heirs—are, she knows what the date is, who the sitting president is, who her doctor is, what her current state of health is. If the client is hard of hearing, if her vision is impaired, or if she is obviously cognitively impaired, then determining the client’s capacity may be difficult. When asking Mom questions to obtain this information, hopefully, you’ll be able to converse with Mom without a desk separating you. This may put her more at ease. You may also observe whether she is uncomfortable in providing the information.

You may ask her if she knows what the purpose of the new deed is. (Perhaps Bob has given her some reason for a new deed in order to get her cooperation). If her response doesn’t make sense, you might proceed as follows:

- Do you know that if you die before Bob, then Bob will own the farm?
- Is this what you intend or do you intend to give the farm to all of your children?
- Have you ever signed a Will or Trust?
- Does your Will leave the farm to all of your children?
- Has anything happened to make you change your mind?
- Are you worried that you might not have enough money to pay your bills?
- Has anyone told you that if you don’t do this, then Bob won’t take care

4. This pamphlet may be accessed at http://www.americanbar.org/content/dam/aba/administrative/law_aging/EthicsBrochure.authcheckdam.pdf.

of you and you will end up in a nursing home?

- Did you know that there are home health care companies that will help you stay in your home so that you can avoid nursing home care?
- Are you afraid of anyone? Is anyone making you afraid or hurting you?

If Mom's answer to any of these questions is "Yes," you will want to get more details.

- Has Mom told any of her other children that Bob (or someone else) is hurting her?
- Has Mom told anyone that Bob is pressuring her to give him the farm?
- Would Mom mind if you talked with other children about this? [If the answer is yes, you would want her to sign a release giving you permission to talk to them. You will need to get their contact information.]

Has she brought it with her? As the *Astor* case shows, it is important to see her past history of dispositional intent. Is the will being proposed making major changes to her past testamentary intent? These are all red flags for the attorney. You could ask her whether she has brought any documents with her containing a legal description of the farm. Explain that it will take you a day or so to complete the document. Can she return on another day to execute it? [This will give you some time to talk with her other children.]

The situation will be even more complicated if Bob asks you to prepare a will or trust for Mom. Perhaps he will tell you what Mom wants her will to say. Lawyers cannot take directions from a third party in this situation. Lawyers are ethically bound to ensure that their client is giving informed consent as to the preparation of any document that disposes of property. The lawyer should make sure the client knows what her alternatives are and that the client is able to make her own choice among the alternatives.

The state of Maine has enacted legislation that states:

In any transfer of real estate or major transfer of personal property or money for less than full consideration or execution of a guaranty by an elderly person who is dependent on others to a person with whom the elderly dependent person has a confidential or fiduciary relationship, it is presumed that the transfer or execution was the result of undue influence, unless the elderly dependent person was represented in the transfer or execution by independent counsel.

Such a transfer may be avoided if the transferee or person who benefits from the execution of a guaranty fails to rebut the presumption.⁵

5. ME. REV. STAT. tit. 33 § 1021–25, Improvident Transfer of Title, *available at* https://www.lawserver.com/law/state/maine/me-statutes/maine_revised_statutes_title_33_chapter_20.

Maine's Act identifies the following persons as possible abusers because they are in a position of trust with the potential to commit financial abuse: (a) a family member, including one by marriage and adoption; (b) a guardian, conservator, trustee, accountant, broker or financial advisor; (c) a physician, nurse or other medical or health care provider; (d) a psychologist, social worker or counselor; (e) an attorney; (f) a priest, minister, rabbi or spiritual advisor; (e) a person who provides care or services to that person whether or not care or services are paid for by the elderly person; (f) a friend or neighbor; or (g) a person sharing the same living quarters.

The American Bar Association's Commission on Law and Aging has a reference section with various charts and resources for lawyers to determine applicable law in each state. For many states, however, those charts are current only to 2006.⁶

Quandary: Bob now has formed the impression that you are on Mom's side and that you do not want to do what he has asked you to do. You do have a choice to elect not to serve Bob's desires, but you might lose paid work if Bob finds an unscrupulous attorney who will prepare the documents, no questions asked.

In such a situation, do you have an obligation to report suspected elder abuse to Adult Protective Services? Most states have statutes regarding obligations to report suspected abuse.⁷

In addition to contacting Adult Protective Services, should you contact a family member? Attorneys have an ethical obligation to maintain a client's confidences. Therefore, without a written authorization signed by Mom to contact a family member, you will not be able to do so.

III. Conclusion

Financial abuse of the dependent elderly is a serious problem. Family lawyers who draft documents that transfer title to property, transfer control over financial accounts, or make testamentary dispositions, should take the lead in helping vulnerable seniors avoid financial disasters. As statistics show, people age sixty and older are divorcing in ever-increasing numbers. Those elders, thus, also need protection from overreaching. But that's a topic for another day.

6. Available at http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html.

7. See resources on the ABA website, available at http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html.

