

Powers of Attorney and Health Care Directives: How Thoughtful Incapacity Planning Can Help Prevent Financial Exploitation



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MEJC Webinar

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Webinar Housekeeping

- Today's webinar runs for one hour.
- You are muted, but can ask questions via the Q&A function. The hand-raising function will not work during this webinar. If we do not answer your questions right away, we will come back to it.
- For a copy of these slides and more information about CLE and CEU credit, please visit the MEJC materials page under the resources tab on our website.
- You will receive an email tomorrow with a brief survey and information about accessing the replay of this webinar.
- Keep an eye out for MEJC's May webinar!

Minnesota Elder Justice Center

www.elderjusticemn.org

Mission: Mobilizing communities to prevent and alleviate abuse, neglect, and financial exploitation of elder and vulnerable adults

Focus on:

- Public Awareness
- Prevention Activities
- Professional Training and Technical Assistance
- Direct Service Intervention Supports
- Systems Collaboration and Change Opportunities

Today's Agenda

- Discuss dynamics of elder abuse and financial exploitation
- Examine legal tools and assignments of authority and fiduciary responsibilities
- Explore the ways in which fiduciary tools can be used to perpetrate *or* prevent financial exploitation

Elder Abuse and Financial Exploitation

Elder Abuse: toward a definition...

- In general, elder abuse is **any knowing, intentional, or negligent act** by a caregiver or any other person that **causes harm or a serious risk of harm** to an older adult.
- Defined by age, relationship, type of abuse
- Victims are often on a continuum from active to having various medical, cognitive, mobility issues
- **2/3** of perpetrators of elder abuse are family members, trusted individuals and/or caregivers

Prevalence


- 1,000,000 – 2,000,000 adults in later life in U.S. are victims of abuse¹
- **1 in 10** persons over the age 60 are victims of elder abuse²
- Victims of elder financial abuse in U.S. lose close to \$3 Billion each year³

¹National Center of Elder Abuse:2005 Elder Abuse Prevalence and Incidence

² National Institute of Justice: Elder Abuse as a Criminal Problem

³ Blancato, Robert: Violence Against Older Women and The Elder Justice Act;
3/04/12

Elder Abuse: Under the Radar



For every one case of
elder abuse that comes
to the attention of a
responsible entity.

1

another twenty three
cases never come to
light.

23

Growth of Older Adults

The Administration on Aging expects that by 2030, the U.S. population over age 65 will have doubled from 2000, with older adults representing 19% of the population.

Types of Abuse

- Domestic Violence Late in Life
- Physical abuse
- Emotional abuse
- Sexual abuse
- Spiritual abuse
- Neglect
- Self Neglect
- Financial Exploitation

Financial Exploitation Examples

Audience Participation:

What are some examples of financial exploitation?

Financial Exploitation Examples

- Using a POA to access another's resources for anything other than the principle's well-being
- Draining or inappropriately using "joint" bank accounts
- Taking loose money in the house
- Checks made over, written out to cash, etc.
- Reverse mortgages or home loans (coerced, without informed consent)
- Getting a credit card in another's name/misusing credit
- Changes in title of real property or stocks
- Selling own car; using victim's car to the exclusion of victim's ability to use it
- Living rent-free
- ...and many more forms of exploitation

Financial Exploitation and Elder Abuse

- The “Gateway Report”
 - Traceable, explainable for third parties
 - Concern for future
- Polyvictimization
- Power & Control
- Entitlement Dynamics

Perpetrator Profile / Signs

- Often times family members or caregivers
- Always with victim
- Controlling
- Short-tempered
- Under/unemployed
- Prior history
- Overly involved
- Gambling/substance abuse or addiction
- Dismissive
- Unusual relationship with victim

Fiduciaries, Assignments of Responsibility, and Legal Tools

What is a Fiduciary?

- A Fiduciary is someone who manages money or property for someone else.
- A Fiduciary has four basic duties:
 1. To act only in the best interest of the person he or she is helping.
 2. To manage the other person's money or property carefully.
 3. To keep the other person's money or property separate from his or her own.
 4. To keep good records.

Minnesota's Statutory Protections for Vulnerable Adults

- Financial Exploitation: Minn. Stat. 609.2335
 - Breach of fiduciary duty – i.e. Power of Attorney
 - Use of property for something other than the benefit of the vulnerable adult
 - Fails to use property for benefit for vulnerable adult
 - Deprives vulnerable adult of financial resources

What is an “Advance Directive?”

An Advance Directive is a document that:

- Legally identifies another person to make a decision for you whether or not (depending upon the document) you’re able to make a decision for yourself
- And/or provides some instruction for that other person regarding your wishes

Why would a person want to have an Advance Directive?

- To assert her or his wishes in the event she or he is not able to communicate
- To provide clarity for family members or friends
- To authoritatively identify who will be “in charge” or a decision-maker in absence of principal

Why should any non-lawyer be familiar with Advance Directives?

Older and vulnerable victims often have assignments of authority in place.

These permissions can be abused, but they also have built-in protections and supervisory authorities that can provide recourse to advocates and interested persons.

Types of Advance Directives

Audience Participation: What are some examples of advance directives?

- A. Power of Attorney
- B. Judgment and Decree
- C. Trust
- D. Health Care Directive
- E. Letter of Official Representative
- F. Memorandum of Delegation

Types of Advance Directives

- Financial Directives (assignments of authority creating Fiduciary relationship)
 - Power of Attorney
 - Statutory Short Form
 - General Durable
 - Trust
 - Other Financial Arrangements:
 - Rep Payee
 - VA Fiduciary
 - Nomination of Guardian (under some circumstances)

Types of Advance Directives

Health Care Directives

- Minnesota Health Care Directive
- Living Will
- Power of Attorney for Health Care
- Nomination of Guardian
- POLST
- DNR/DNI/DNH

Power of Attorney

- Legal document that gives permission for another person (people) to conduct financial business on your behalf.
- You: “Principal”
- Other(s) (Fiduciaries) identified as “Attorneys In Fact”

Power of Attorney

Two types of Power of Attorney documents in Minnesota:

- General (or Common Law)
- Statutory Short Form MN Stat. 523.23

What is a Trustee?

- A trustee is a person who makes decisions about the money or property in a trust
- There can be one trustee, or more than one (co-trustees).
- A “successor trustee” is a person who acts when the initial trustee can no longer make decisions
- A trustee has authority over only the property actual transferred into the trust

Trustee roles and responsibilities

- Roles and responsibilities of trustees include basic fiduciary duties, as well as many other specific responsibilities as defined by the language of the trust document itself
- You must review the trust document to understand trustee responsibilities

Rep Payee and VA Fiduciaries

- These are roles appointed by government agencies to help manage income benefits for another person.
- Social Security, Railroad Retirement, and the office of Personnel Management appoint “Representative Payees.”
- The Department of Veterans Affairs appoints “VA Fiduciaries.”
- The Rep Payee or VA Fiduciary manages only the benefits of the appointing agency.

Health Care Directive

- Names a person (or people) to make a health care decision on your behalf if you are not able to make a decision
- Unification of two prior documents:
 - Living Will
 - Power of Attorney for Healthcare

What is a guardianship?

- Relationship between an incapacitated person, the “ward,” and a person who helps the ward, the guardian
- Guardian: a person who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent or spouse, or by the court, and includes a limited, emergency, or temporary substitute guardian but not a guardian ad litem
- Types:
 - Guardian of a minor
 - Guardian of an incapacitated person

What is a conservatorship?

- Relationship between individual who cannot manage his/her own financial affairs, the “protected person,” and an individual helping the protected person, the conservator.
- Conservator: a person who is appointed by a court to manage the estate of a protected person, and includes a limited conservator
- Types:
 - Unlimited conservatorship
 - Limited conservatorship
 - Other Protective Order

Requirements in Imposition:

- Must be cause or reason to believe that the person is incapacitated
 - Diagnosis which may indicate incapacity is not enough
- Must be evidence which supports the belief, i.e. behavior which demonstrates incapacity

Risks In Imposing Guardianship and/or Conservatorship

- Imposition on Ward/Protected Person's civil rights and autonomy
- Must be no "less restrictive alternatives"
 - POA, HCD, trustee, other fiduciary
 - Supported Decision Making

What *is* “incapacity planning”?

- Execution of legal documents nominating another person to make decisions in the event that you are incapacitated
- Examples:
 - POAs
 - HCDs
 - Trusts

What if you are a “solo senior”?

- Solo seniors: People who, by choice or circumstance, function without the support system traditionally provided by family
- Isolation can be a significant problem
- What are your options for incapacity planning?
 - Non-traditional family choices
 - Long-term friends
 - Community supports
 - Professional fiduciaries
- “A Backup Plan for Solos”: check out at elderjusticemn.org

... Does not only impact us as professionals

Audience poll:

Have you been nominated at any time to serve as another person's fiduciary in some capacity?

Yes or No

Fiduciaries and Financial Exploitation

Fiduciaries can perpetrate financial exploitation

Case Study: Susan*

- Susan had a major stroke
- Daughter had POA and became Rep Payee
- Susan's niece contacted MEJC because her aunt had no access to any funds and the facility was not being paid
- Susan had no personal possessions

*Name has been changed

Fiduciaries and prevention of exploitation

Case Study: Susan

- Susan's daughter's POA and Rep Payee were removed
- Within two months, Susan was moved by her other relatives to a better facility
- Susan was able to access the medical devices she needed to communicate post-stroke
- Susan had access to money—significant lifestyle improvements

Fiduciaries can prevent financial exploitation

Case Study: Bob*

- Bob's assets were held in trust; after his wife's death, his daughter took over management of the trust
- Bob received scamming phone call
- Bob wanted to send money... but needed trustee's assistance to send it

*Name has been changed.

Fiduciaries can prevent financial exploitation

A common refrain you may hear suggests that incapacity planning can prevent financial exploitation—but how?

Marlene Stum, Ph.D. Professor, Family Social Science

Significant qualitative research into Elder Family Financial Exploitation (EFFE)

Studied a series of families impacted by EFFE—23 total primary victims. One finding of her study:

Audience participation: How many of the 23 had a form of HCD?

How many of the 23 had a form of POA?

Marlene Stum, Ph.D. Professor, Family Social Science

Significant qualitative research into Elder Familial Financial Exploitation (EFFE)

Studied a series of families impacted by EFFE—23 total primary victims. One finding of her study:

15/23 had a form of Health Care Directive.*

13/23 had a form of Power of Attorney.*

*Stum, M. (2019). When it's family: Examining the meaning and experience of elder family financial exploitation. Research Report. University of Minnesota.

Who do you pick?

Audience participation:

What are some traits that you should look for in a potential fiduciary?

Positive Traits in Potential Fiduciaries:

- Similar Values
- Good recordkeeping skills
- Financially solvent
- Trustworthy
- Calm under stress and/or during conflicts
- Seeks out information to serve in role better
- Understands boundaries between their opinion versus instructions given by principal
- Able to be transparent with other family members/friends
- Past history of trustworthiness/conflict management
- Past history of family conflict

Who do you pick?

Audience participation:

What are some red flags that you should watch out for in a potential fiduciary?

Red Flags in Potential Fiduciaries

- History of conflict with other family/friends
- Not transparent/open in communication with decisionmaking
- Has strong opinions about principal's health choices/financial choices that are in opposition to and/or disrespectful of principal's choices
- Ongoing struggles with addiction, mental health crises, etc. which manifest in negative ways surrounding principal's home and/or property
- Serious financial management problems
- Insulting/emotionally abusive behaviors

Marlene Stum, Ph.D., EFFE Research: Lessons Learned*:

1. Plan Ahead

- Formal, concrete, in writing
- Know what you can legally do
- Formalize plans with incapacity documents: POA, HCDs
- Have a will—don't do it reactively
- Anticipate: don't wait

*Stum, M. (2019). When it's family: Examining the meaning and experience of elder family financial exploitation. Research Report. University of Minnesota.

Marlene Stum, Ph.D., EFFE Research: Lessons Learned*:

2. Trust your Instincts

- Know your family; speak up; be persistent
- Ask questions without fear of offending
- Avoid assumptions
- If something feels off, document and record
- Be aware of your family context: risk factors and red flags
 - isolation
 - mental illness
 - unemployment
 - addiction
 - let past behavior be a guide

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Marlene Stum, Ph.D., EFFE Research: Lessons Learned*:

3. Communication

- Listening and talking with family
- Intergenerational culture of openness; prevent secrets
- Normalize talking about money, plans, and mortality
- Be clear about motives and don't be afraid

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Marlene Stum, Ph.D., EFFE Research: Lessons Learned*:

4. Be involved/be present

- Know that distance can be a warning sign of abuse
- Have a pulse on what's going on; check in and call
- How much do you know versus how much you assume
- Interact with elder about capacity and safety
- Have one-on-one interactions with the elder; note behaviors

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Incapacity Planning as Prevention

Final lessons:

1. Powerful tools
2. Don't focus on the document: focus on the person nominated
3. Communication and Transparency
4. Ongoing process: stay involved and up to date!



Tuesday, April 16th, 2019

Incapacity Planning Clinics – HCDs and POAs

Two locations:

Episcopal Homes in St. Paul, MN

(651) 440-9305 or nhdd@elderjusticemn.org

Perham Community Center in Perham, MN

(320) 762-0663 or sbruckner@lsnmlaw.org

The Minnesota Elder Justice Center

World Elder Abuse Awareness Day!

June 5, 2019



Thank you for your time and attention!

Questions?

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651-440-9305