financial exploitation of the elderly: elements and remedies

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FINANCIAL EXPLOITATION OF THE ELDERLY: ELEMENTS AND REMEDIES

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FINANCIAL EXPLOITATION – FACTUAL ISSUES

Financial exploitation – what is it?

Financial exploitation is not easy to spot since much of what is going on is not readily apparent. The exploited person is often embarrassed or afraid to notify family members much less report the matter to the police. Yet, it is also easy to jump to conclusions when in fact Mom or Dad are doing exactly what they want with their funds but the children or other family members do not approve. Always remember that is Mom and/or Dad’s money to with as they please, to include doing stupid things with it.

The studies on financial exploitation, particularly when done by a family member or close friend, are of very limited use since all of the authorities on this topic agree that exploitation is greatly underreported, resulting in some very sketchy figures on the extent of the problem. Michael J. Tueth, “Exposing Financial Exploitation of Impaired Elderly Persons”, American Journal of Geriatric Psychiatry, May 2000; Hall, Hall & Chapman, “Exploitation of the Elderly: Undue Influence As A Form of Elder Abuse”, Clinical Geriatrics, February 2005.
Financial exploitation – how to spot it

There are two common threads in all of the financial exploitation cases I have dealt with. One common feature is the aspect of secrecy. No one outside of the exploiter and expolitee is aware of the situation as it is occurring. The other common feature is either isolation or domination of the exploited person by the exploiter.

Much of the literature emphasizes tell-tale signs that are ridiculously obvious but, in my experience, seldom seen. A typical example set forth in the literature is a child with no apparent source of income who is living extravagantly. But such obvious, blatant examples are rare. Exploiters not want to call attention to themselves. Secrecy and lulling other family members into a sense of complacency is key. More typical in my experience has been:

**Preventing or greatly limiting access to the residence.** Family members must call ahead to visit with Mom. Or the visits keep getting cancelled at the last minute. Or they can only occur at inconvenient times, such as early weekday mornings. Or the visiting child is never allowed to be alone with Mom, either in the home or taken out for a meal or shopping.

**Preventing or greatly limiting access to the telephone.** Very similar tactics. Mom is sleeping and cannot come to the phone. Or the exploiter insists on being on the line with Mom.

**Unpaid bills or increased credit card activity.** Most elderly people are very scrupulous about paying bills on time and keeping debt to a minimum. Unpaid bills may be indicative of the fact that Mom or Dad have relinquished control over their finances and the fact that the bills are not being paid may indicate that money that should be available to pay them is not available. Why? And who is making this determination? Likewise, credit card activity is a likely tipoff. Look to see where the charges are taking place – fancy restaurants or bars that Mom or Dad would never frequent? Chic or high-end clothing stores where it is unlikely Mom or Dad would ever go or purchase anything?
Charges for baby clothes or other charges for young children when Mom and Dad have none of their own?

**ATMs.** Another danger sign is increased ATM activity – this is not the way the elderly handle their finances. It is a common tactic for the more savvy exploiter since they figure that cash is harder to trace.

**Missing appointments.** Are Mom and Dad’s needs being met? Are they regularly visiting their doctor? Is Mom making her hair appointments?

**Ending long-term relationships.** Is there a new attorney, doctor, accountant or financial advisor in place of the professionals that Mom and Dad have used for years? There are several reasons why exploiters use this method. One is that they are afraid that the long-term advisor who knows many of the family members may report their suspicions to the family. It is also easier to hide sudden changes in finances when a new advisor is brought on without adequate knowledge of Mom and Dad’s financial history. A recurring problem for me has been the use of document preparers who, when trouble arises, will hide behind the fact that they are “only” document preparers. They will claim that they did not discuss the situation with Mom or Dad and simply prepared the documents they asked for with no questions asked. I doubt this is what happens but it is hard to prove otherwise. Any why would a wealthy person retain a flimsy, low-budget operation to do something so important as make a will or trust? Whose idea was it to terminate the existing relationship?

**Recorded documents.** If there are concerns about Mom and Dad’s situation, a great place to start is doing an on-line search with the county recorder. Very few lay persons are aware of how easy it now is to review recorded documents. Are there deeds that have been cut? Has a POA been recorded? Is there a judgment or tax lien against Mom, Dad or the exploiter? I have had several cases where this was the tip-off that something untoward was up.
**Personalities.** You also must scrutinize the persons who are helping Mom and Dad. Do they have a spotty work history? Are they going through a troubling time or event, such as a divorce, a bankruptcy or an arrest? Do they have a history of substance abuse? Or are they just anti-social with little regard for the rights of others?

But the fact remains that it is often difficult to find out about these matters. The exploiter makes it difficult and Mom and Dad, even if they suspect something is amiss, are often reluctant or embarrassed to talk about it. Or they may have themselves convinced that nothing has happened or that the exploiter will correct the situation.

When suspicions are raised, it has always been my practice to address the matter head-on. Explain to the parents that the children are concerned and maybe even tormented by what they think is going on. If there is nothing to worry about, why not let them know? If there is a problem, then it is only a matter of time before the other children find out. This usually happens within days of the funeral, when emotions are already sky-high and what could otherwise be a manageable situation now explodes into all-out family warfare – is this what Mom and Dad want?

A very problematic ethical dilemma for attorneys occurs when Mom and Dad, both of capacity, are aware of the situation but do not want to make an issue of the matter. Typically, they do not believe that the amounts are large enough to risk a confrontation or they are afraid of the consequences if the exploitation comes to light. The children will be in an uproar, which is not what Mom and Dad want in their last days. Or they are afraid that the child could end up in jail or have a costly court battle on their hands. Or they are afraid that, with the caregiver child gone, that they will end up in the dreaded nursing home. Or they will correct the problem by leaving the exploiter out of the will.

The list goes on, but the problem is that there may be valid reasons why Mom and Dad want to look the other way. But the attorney must be aware that there will eventually be hell to pay and the attorney will likely be caught in the crossfire if nothing is done.
The other difficulty is ascertaining if any financial exploitation has in fact occurred. Simply because the children do not agree with what Mom or Dad is doing does not equate with financial exploitation. There may be a good reason why one child is being favored, particularly when that child is the primary caregiver. The non-caregiver children almost never fully appreciate the time, effort and anguish that caregiving entails. I always warn the caregiver child – do not expect profuse gratitude from your siblings for the care provided to Mom or Dad. This may be Mom and Dad’s way of repaying the caregiver child but the other children seldom see it that way. This is where thorough discussion and documentation is absolutely essential. And the value of the attorney services skyrockets when he or she becomes the corporate memory for Mom and Dad. The peace of mind afforded by making sure that Mom and Dad’s testamentary desires are enforced can be priceless.

If the attorney suspects trouble, address it in the fee agreement that the estate will pay your fees if called as a witness at a deposition or trial and to cover copying costs and other costs of production.

FINANCIAL EXPLOITATION – LEGAL ISSUES

ARS 46-456 – Financial exploitation of a vulnerable adult

The starting point in analyzing a potential financial exploitation claim is to review the statutory form of action, ARS 46-456. This is a rather vague statute that, until recently, had no reported case to assist in interpreting the statute. This ambiguity can cut both ways. One is that it allows for some creativity since there is no limiting case law or other interpretation of the statute. But since there is no firm guidance, this can be both an incentive as well as a stumbling block to reaching a settlement. On the other hand, one should be reluctant to push the envelope given the uncertainties of statutory interpretation. This is particularly a problem for a defendant because of the draconian penalties if a violation of the statute is found.

In interpreting ARS 46-456 and its companion statute dealing with physical abuse and neglect, ARS 46-455, the courts have emphasized the broad, sweeping nature of the
What is the procedure?

Note that since this is a Title 46 civil action, jurisdiction is not limited to the probate courts. I have prosecuted cases as a non-probate civil matter to increase my chances of a jury trial.

Subparagraph (c) states that it is brought “in a civil action”. I was involved in a recent case, Estate of James S. Blackford, 1CA-CV06-0172, in which the Court of Appeals held in a memorandum decision that an allegation of ARS 46-456 must be initiated in “a separate civil action”. Presumably, this complaint could then be consolidated with any probate action in accordance with Rule 42(a) of Civil Procedure.


Who is protected?

ARS 46-456(a) protects “an incapacitated or vulnerable adult”. The definitional section is ARS 46-451. Incapacity has an almost identical definition as that used in the probate code, ARS 14-5101(1). The two differences are that a) “advanced age” can be a reason for the incapacity and b) it is the inability to make informed decisions rather than responsible decisions. One wonders if this is a significant difference or why it exists.

“Vulnerable” is defined as someone who is “unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment”. ARS 45-451(10). The conventional wisdom among probate litigation practitioners is that this is equivalent to the standard for a conservatorship, someone who is “unable to manage the person’s estate and affairs effectively” who “has property that will be wasted or dissipated unless proper management is provided”. ARS 14-5401(2). If this is so, then note that a conservatorship does not require a finding of incapacity. Arizona Probate Code Practice Manual, Sec. 8.1
The recent case of *Davis v. Zlatos*, 211 Ariz 519, 123 P3d 1156 (CA1, 2005) is the first reported case that extensively discusses ARS 46-456, financial exploitation of a vulnerable adult. Caregiver and his daughter provided 12 hour care, seven days a week for several years for wife. Husband was in nursing home. Within a five month period, wife issues a number of checks with indication that they are loans in the collective amount of $23,400. Wife then has their home deeded to caregiver, with husband’s consent and with title company involvement, in that same period.

Court of Appeals reverses trial court’s finding that no financial exploitation occurred. Court extensively discusses ARS 45-456, making three findings. First, court finds that wife was physically impaired, using the common usage of that term since there is no statutory definition, and therefore vulnerable. Wife was 86, “frail and unable to walk”, needed assistance with all ADLs and son-in-law handled all financial matters. She was “totally dependent on (the caregiver) for her daily needs” and was living alone without her husband for the first time in nearly 70 years.

Next, court ruled that was unable to protect herself from exploitation. Caregiver had emphasized that wife had not complained about the transactions. Court states that “failure to complain is not persuasive evidence that a person is not vulnerable”.

Finally, the court ruled that the caregiver failed to uphold his duties, using the statutory reference to the duties of a trustee. Court finds that the self-dealing constituted a breach of his fiduciary duties.

Court finds no reason to remand, finding as a matter of law that financial exploitation had occurred.

In a memorandum decision reaching a similar result, the Court of Appeals held that an elderly person may be vulnerable even if the alleged exploited person was “sharp”, “alert”, “bright”, “aware of what was going on around her” and “of sound mind”. The Court agreed with the trial judge (Judge Mundell) that the person’s “physical condition was sufficient to support a conclusion that Lillian was a vulnerable adult”. The trial court found that the person was virtually blind, with hearing aids in both ears, could
not walk and could not use a telephone. Miller v. Lee, 1CA-CV02-0043 (Feb 27, 2003), paragraph 33.

Who is a defendant?

Anyone who is in a “position of trust and confidence” is a covered person, a potential defendant. ARS 46-456(a) & (b). This is defined as a) someone who has assumed a duty to provide care, b) a joint tenant or tenant in common and c) someone who is in a fiduciary relationship with the person. ARS 46-456(g)(3). It will also include anyone acting as a trustee. ARS 46-456(a) & 14-7301 et seq. The first two classifications and the duties of a trustee are straightforward. The meaning of a fiduciary relationship is discussed in further detail later in these materials.

An agent acting under a power of attorney comes within the reach of ARS 46-456. The power of attorney statute, ARS 1405506(a), states that if the agent fails to act in the “principal’s best interest” or uses the principal’s money for the agent’s benefit, then the agent is “subject to ….. civil penalties pursuant to ARS 46-456”. Note that “best interest” is defined as “the agent acts solely for the principal’s benefit”. ARS 14-5506(f). It is also triggered “if the agent acted with intimidation or deception as defined by ARS 46-456 in procuring the power of attorney”. ARS 14-5506(c).

What is exploitation?

Exploitation is defined as “the illegal or improper use of an incapacitated or vulnerable adult or his resources for another’s profit or advantage”. ARS 46-451(a)(5). This definition, when combined with the requirement of ARS 46-456(a) that a person in a position of trust and confidence has duties equivalent to a trustee, means that we are really talking about breach of fiduciary duties.

There is also ARS 46-456(b) that makes a violation a crime if the person in a position of trust and confidence “by intimidation or deception knowingly takes control, title, use or management” of assets. ARS 46-456(g)(1) sets a rather easy standard for proving “deception” – creating or failing to correct a false impression, making a promise
that the promisor does not intends to perform, or misrepresenting or concealing a material fact relating to a contract or agreement.

“Intimidation” includes threatening to deprive a person of “food, nutrition, shelter or necessary medication or medical treatment”.

These are the elements to prove a crime. Yet, proof of this should be, in most cases, sufficient to constitute a breach of a fiduciary duty.

Many practitioners have noted that there is no minimum dollar amount that must be met before the statute is triggered, so that even a small or nominal breach of a fiduciary duty must constitute an actionable claim. There is also no scienter requirement – negligence is enough. Clients acting in a fiduciary capacity need to be warned of this, especially if there are other family members spoiling for a fight.

What happens if there is exploitation?

This is where it can get ugly. Really ugly, since the penalties of a violation of the statute are so severe.

First and foremost, anyone who has violated the statute, whether intentionally or not, “forfeits all benefits with respect to the estate of the deceased, incapacitated or vulnerable adult, including an intestate share, an elective share, an omitted spouse’s share, an omitted child’s share, a homestead allowance, an exempt property allowance and a family allowance”. ARS 46-456(d).

A recurring question that has been raised at the Superior Court level is what constitutes the “estate” of a deceased? Is it the probate estate? Does it include a trust? What of jointly titled property or payable on death designations? What of 401k plans and other ERISA assets? In other words, is the listing in paragraph (d) meant to be exhaustive?

There is no reported case on this but this issue has been addressed in a memorandum decision, Estate of May L. Shirley, 1CA-CV 01-0173 (Apr 24, 2003). There, the Court of Appeals ruled that the credit shelter trust created by the deceased husband for the benefit of the exploited spouse was not part of the estate for purposes of forfeiting the exploiter child’s interest under ARS 46-456(d). The Superior Court judges
who have addressed it have not been consistent, although it is my understanding that most judges have limited the application of ARS 46-456 to the probate estate.

It would appear that this statute would not apply to 401k plans and other ERISA assets since the federal ERISA statutes regarding beneficiary designations would preempt any state law to the contrary. *Egelhoff v. Egelhoff*, 121 SCt 1322 (2001).

The statute also provides for treble damages, ARS 46-456(c), as well as punitive damages and reasonable attorney fees, ARS 46-456(e) & -455(h), and the dissolution or divestiture of any enterprise found liable.

What is the standard of proof?

Proof is by a preponderance of the evidence. ARS 46-456(e) & -455(l).

What is the statute of limitations?

The statute of limitation is currently two years from the date of actual discovery of the cause of action. ARS 46-456(e) & -455(k). But note that this is only for actions accruing after September 18, 2003. The prior statute of limitations is seven years from the date of actual discovery.

A cause of action under this statute survives death, to include any action for pain and suffering. ARS 46-456(e) & -455(p), *Denton v. American Family Care*, 190 Arz 152 (1997).

Common law financial exploitation – breach of fiduciary duties

What is a fiduciary?

A fiduciary cannot unfairly taken advantage of a person who has entered into a confidential or fiduciary relationship. For a confidential relationship to exist, “there must be something approximating business agency, professional relationship or family tie impelling or inducing the trusting party to relax the care and vigilance he would ordinarily exercise”. *In Re McDonnell’s Estate*, 65 Ariz 248, 253 (1947).

It has also been defined as
“(a) relationship which arises by reason of kinship between the parties, or professional, business or social relations that would reasonably lead an ordinarily prudent person in the management of his business affairs to repose that degree of confidence in another which largely results in the substitution of that other’s will for his in the material matters involved in the transaction; or where the parties occupy relations, whether legal, natural, or conventional in their origin, in which confidence is naturally inspired or, in fact, reasonably exists.”

In Re Guardianship of Chandos, 18 Ariz App 583, 585 (1972);

It is a relationship with “great intimacy, disclosure of secrets or intrusting of power”. “Mere trust in another’s competence or integrity does not suffice, peculiar reliance in the trustworthiness of another is required”. Taeger v. Catholic Family and Community Services, 196 Ariz 285 (CA1, 1999).

A commercial contractual relationship, even where the collection of money is concerned, will not by itself create a fiduciary relationship unless the contract so states. Urias v. PCS Health Systems, Inc., 458 Ariz Adv Rep 3, (CA1, 2005).

Such a relationship “is particularly likely to exist where there is a family relationship”, Restatement of Trusts, Second, Sec. 2, comment b. Arizona courts have found that “the relationship between husband and wife is confidential in the highest degree”. MacRae v. MacRae, 37 Ariz 307, 314 (1930). In Re Marriage of Gerow, 192 Ariz 9, 18 (CA1, 1998, memorandum decision); State Farm Mutual Automobile Insurance Co. v. Long, 16 Ariz App 222, 225 (CA1, 1972); Blazak v. Superior Court, 177 Ariz 535, 539 (CA1, 1994) and Nanini v. Nanini, 166 Ariz 287 (CA2, 1990)

What constitutes a breach of the fiduciary relationship?

When a person in a fiduciary relationship has received any benefit, practitioners need to keep in mind the following quote from the controversial case of Estate of Shumway, 198 Ariz 323 (2000):

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“Where a confidential relationship is shown, the presumption of invalidity can be overcome only by clear and convincing evidence that the transaction was fair and voluntary. This is a difficult standard of proof.”

198 Ariz at 328

What this means is that a plaintiff in a financial exploitation action need only prove two elements: the existence of a fiduciary relationship and self-dealing by the fiduciary. Chandos, supra.

For agents acting pursuant to a power of attorney, this has been taken a step further with requirement of the agent acting solely for the principal’s benefit that has been codified in ARS 14-5506(a). A power of attorney that authorized one to act on behalf of another creates an agency relationship. An agent is a fiduciary of the principal, Restatement of Agency, Second, Sec. 13, who “is subject to a duty to his principal to act solely for the benefit of the principal”, Restatement of Agency, Second, Sec. 387 (emphasis added).

Likewise, under agency concepts, one acting on behalf of another "is bound to exercise the utmost good faith" with the burden of proof resting on the agent to show "an absence of all undue influence, advantage or imposition". Starkweather v. Conner, 44 Ariz 369, 376 (1934). Even "(i)f the principal consents to a self-dealing transaction, the agent nevertheless must conform to the standard that the transaction be 'fair and reasonable' to the principal." Comment (e) to Sec. 1.01, Restatement of the Law of Agency Third, Tentative Draft No. 2 (March 14, 2001).

What are the consequences of a breach of fiduciary duties?

While Arizona courts have not always made a distinction between fiduciary and confidential relationships, it is clear that a breach of duties created by either relationship will constitute constructive fraud. In Re Purton, 7 Ariz App 526, 533 (1968); Raestle v. Whitson, 119 Ariz 524 (1978); Matter of Swartz, 129 Ariz 288, 294 (1981).

Constructive fraud has two elements: a fiduciary relationship and the lack of full and truthful disclosure of all materials facts. Rhoads v. Harvey Publications, Inc., 145 Ariz 142, 148-9 (CA2, 1985). Neither intent to deceive nor dishonesty of purpose is a
necessary element of constructive fraud. Lasley v. Helms, 179 Ariz 589, 592 (CA1, 1994).

Once a confidential or fiduciary relationship is established, a presumption of constructive fraud is created which places the burden upon the alleged perpetrator to prove, by clear and convincing evidence, that she acted in the principal’s best interest. Chandos, supra, 18 Ariz App at 585, and that the transfer was made freely and voluntarily by the alleged exploited person and with that person’s full knowledge of the facts, Eagerton v. Fleming, 145 Ariz 289, 292 (CA2, 1985). The duty to disclose is not obviated by a showing that the outcome of a transaction was fair to the alleged exploited person. Full disclosure of all pertinent information, including the presence of any conflicts of interest, is independently required. Estate of Weiner, 120 Ariz 349, 352 (1978)

Failure to provide the clear and convincing evidence renders the transactions voidable. ARS 14-5422; Chandros, supra.

Said failure also is grounds for the imposition of a constructive trust, which is a remedial device used to prevent unjust enrichment or when it is inequitable to allow property to be retained by the legal title holder. Burch & Cracchiolo PA v. Pugliani, 144 Ariz 281, 285 (1985). Because of the variety of circumstances in which a constructive trust has been imposed, the doctrine has remained flexible. As Justice Cardozo explained:

"A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee ….A court in equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief."

“In most cases where a constructive trust has been established, it appears there has been shown in addition to the family relationship such factors as age and infirmity on one hand, actual dominance on the part of one of the parties, an established course of management of the grantor's affairs by the grantee, or other similar facts making it inequitable to allow the grantee to prevail.”


The constructive trustee is required to account for all monies provided to her together with all investment proceeds from that money. *LM White Contracting Co. v. Tucson Rock and Sand Co.*, 11 Ariz App 540, 545 (CA2, 1970), ARS 14-7235(b).

FINANCIAL EXPLOITATION – OTHER LEGAL ISSUES

Exploitation with no fiduciary relationship

Trover and conversion

Conversion involves an act of dominion wrongfully asserted over another's personal property in denial of or inconsistent with that person's rights in the property. *Scott v. Allstate Ins. Co.*, 27 Ariz. App. 236, 240, 553 P.2d 1221, 1225 (App. 1976). Therefore, "[n]either good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are the gist of the action." *Mezey v. Fioramonti*, 204 Ariz 599 (CA1, 2003). It is the exercise of intentional dominion or control over the property in such a way that it interferes with true owner's rights to the extent that he should be required to pay the full value of the property. *Miller v. Hehlen*, 209 Ariz 462, 472 (CA2, 2005). It is conduct intended to affect property of another. The intent required is "'an intent to exercise a dominion or control over the goods which is in fact inconsistent with the

The imposition of a constructive trust is authorized to recoup the converted property. Mezey, supra at 608. Keep in mind that the property must be separately identifiable or segregated for a cognizable conversion claim. The general allegation of a debt is not sufficient. Case Corp v. Gehrke, 208 Ariz 140 (CA1, 2004).

Unjust enrichment

In Arizona, five elements must be proved to make a case of unjust enrichment: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) absence of justification for the enrichment and the impoverishment and (5) an absence of a remedy provided by law. City of Sierra Vista v. Cochise Enter., Inc., 144 Ariz. 375, 381, 697 P.2d 1125, 1131 (App. 1984); Stapley v. American Bathtub Liners, Inc., 162 Ariz. 564, 568, 785 P.2d 84, 88 (App.1989)

Deceptive trade practice

Arizona's consumer fraud statute, A.R.S. §14-1522. That statute provides:

The act, use or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.
§ 44-1522(a)). To succeed on a claim of consumer fraud, a plaintiff must show a false promise or misrepresentation made in connection with the sale or advertisement of merchandise and consequent and proximate injury resulting from the Promise. Correa v. Pecos Valley Dev. Corp., 126 Ariz. 601, 605, 617 P.2d 767, 771 (App. 1980). An injury occurs when a consumer relies, even unreasonably, on false or misrepresented information.

Courts have held that this statute does create a private cause of action. Holeman v. Neils, 803 F Supp 237 (D Ariz, 1992).

**Lack of capacity, lack of knowledge and undue influence**

Many times, the financial exploitation is not discovered until after the exploited person has died. The financial exploitation case then takes on many facets of a will contest. Issues such as incapacity, lack of knowledge and undue influence will be raised. Conceptually, the issues are largely the same regarding transfers done while the decedent was alive (ie, deeds, contracts, etc) or in a post-mortem setting (wills, trusts, POD designations, etc.). The only difference is that a will is given certain protections through the use of presumptions in favor of the validity of a properly executed will.

Keep in mind that these issues will normally only be raised where no fiduciary relationship exists.

**Capacity To Contract**

Capacity to contract is presumed. Capacity is defined as “whether, under all the circumstances, the person’s mental abilities have been so affected as to render him incapable of understanding the nature and consequences of his act, that is, unable to understand the character of the transaction in question”. Hendricks v. Simper, 24 Ariz App 415, 418 (1975). The party challenging a contract on incapacity grounds must prove incapacity by clear and convincing evidence.
The same test holds for the conveyance of real estate, with the focus on capacity at the time of delivery.  *Stewart v. Woodruff*, 19 Ariz App 190 (1973); *Pass v. Stephens*, 22 Ariz 461 (1921)

A similar if not identical test exists for executing a power of attorney, which requires that “the person is capable of understanding in a reasonable manner, the nature and effect of his act”.  *Golleher v. Horton*, 148 Ariz 537, 540 (CA1, 1985).  The test is not whether the principal understood each potential transaction that was authorized under the POA.

The capacity to create, amend, revoke or fund a trust is governed by the terms of the trust.  *In Re Estate of Pilafas*, 172 Ariz 207, 211 (CA1, 1992).

**Capacity To Make a Will & Undue Influence**

These two issues have already been addressed elsewhere in my materials.

**Statute of limitations**

When a fiduciary relationship is found to exist, it is not always clear when the statute of limitations begins to run and whether it has been tolled.

“With respect to those in a professional or fiduciary relationship with the tortfeasor, an adverse or untoward result, or a failure to achieve an expected result, is not, as a matter of law, always sufficient notice. To trigger the statute of limitations, something more is required than the mere knowledge that one has suffered an adverse result while under the care of a professional fiduciary”


If, as will normally be the case in a financial exploitation situation, the bad act was concealed or otherwise not disclosed by a fiduciary, then the concept of fraudulent concealment exists and will also toll the statute.  *Morrison v. Acton*, 68 Ariz 27 (1948).  The exploited person “is relieved of the duty of diligent investigation required by the discovery rule and the statute of limitations is tolled until such concealment is discovered, or reasonably should have been discovered”.  *Walk*, supra, 202 Ariz at 319.
Dead Man’s Statute

Many times, the alleged exploiter will argue that promises were made by the exploitee or that some other agreement or understanding was reached. In a post-mortem setting, practitioners must be familiar with the workings of the Dead Man’s Statute to prevent the mischief that such self-serving evidence can create. The Dead Man’s Statute, ARS 12-2251, states, in part, that in a probate action “neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward unless called to testify thereto by the opposite party”. It applies to interested parties as well, such as heirs and devisees. Condos v. Felder, 92 Ariz 366, 372 (1962); Cachenos v. Baumann, 25 Ariz App 502, 505-506 (CA1, 1976).

The Statute is designed to apply to “persons who will gain from inaccurate distortions of a transaction with (a) decedent….where death has rendered decedent incapable to giving the lie to the inaccuracies”. Carillo v. Taylor, 81 Ariz 14, 25 (1956). See also Fridena v. Evans, 127 Ariz 516, 521 (1980)

In applying the Statute, courts look for corroboration or some other indicia of reliability that “strengthenes or confirms that either the statement was made or that the statement was true”. Troutman v. Valley National Bank of Arizona, 170 Ariz 513, 517 (CA1, 1992).

Most practitioners overlook the fact that, even if the admission of a statement is not precluded by the Dead Man’s Statute, the statement is still subject to a hearsay objection. Rules 803 & 804 of Evidence.

Parol evidence rule

A closely related issue to the Dead Man’s Statute is the parol evidence rule which governs the admissibility of testimony or other evidence to supplement the party’s understanding of the terms of a written agreement. In a financial exploitation setting, one party or another will often try to explain away or contradict a written document that evidences an agreement or transaction. Arizona has a very liberal and permissive parol evidence rule and the leading case is Taylor v. State Farm Mutual Automobile Insurance Co., 175 Ariz 148 (1993). An instructive and recent case is Long v. City of Glendale,
208 Ariz 319 (CA1, 2004), where the Court held that extrinsic evidence could be used in interpreting a deed. The Court then went on to apply the rule, stating that as long as there is ambiguity in the written language in the deed that is “reasonably susceptible” to the interpretation asserted by the proponent of the extrinsic evidence, then the extrinsic evidence must be admitted. 208 Ariz at 328.

However, the parol evidence rule cannot be used to prevent the introduction of fraudulent actions that contradict the terms of the written agreement, so that an exploiter cannot hide behind a document whose creation was fraudulently induced. Lusk Corp v. Burgess, 85 Ariz 90 (1958). See also Pinnacle Peak Developers v. TRW Investment Corp, 129 Ariz 385 (CA1, 1980).

Standing of beneficiaries to contest

A very overlooked concept is that beneficiaries of a trust or estate may not be bound by any alleged agreements made between the grantor/testator and a third party. For instance, a recent case has held that beneficiaries of a trust were not bound by an arbitration clause between the trustee and the brokerage house, Schoneberger v. Oelze, 208 Ariz 591 (CA1, 2004), or that beneficiaries of a probate estate were not bound by a wrongful death settlement reached by the personal representative. Wilmot v. Wilmot, 203 Ariz 565 (2002).

In a financial exploitation setting, this means that beneficiaries may be able to void any alleged deal between exploiter and exploitee, regardless of the apparent fairness of it.

The way to avoid this problem and enforce the terms of the transaction is to obtain court approval. Such approval is binding as to all if proper notice is given and no fraud is alleged in obtaining the approval. Estate of Thurston, 199 Ariz 215 (CA1, 2000)

REMEDIES FOR FINANCIAL EXPLOITATION

Once you are reasonably sure that financial exploitation has occurred, the objective becomes three-fold – to find out exactly what has happened, to stop further
exploitation and to recoup any misappropriated funds. This will almost always require court action, which can take a variety forms. I will typically file an emergency conservatorship proceeding but there are other avenues available.

Injunctive relief

Many attorneys will file for a temporary restraining order or preliminary injunction as set forth in Rules 52 and 65 of Civil Procedure and ARS 12-1801. I have shied away from these because these procedures require the petitioner to prove his case which I may not be able to do.

To obtain a TRO, the plaintiff must prove that there will be “immediate and irreparable injury, loss or damage” unless the TRO is granted. Being swindled is never a good thing, but the harm may not be irreparable and the extent of the harm may not be known at that time. The court is required to set forth findings of fact and conclusions of law, stating the reasons for the issuance of the TRO and a description “in reasonable detail” of the alleged wrongful acts. Again, the details may be sketchy at this point. And drafting a set of proposed findings of fact and conclusions of law can be a tedious and time-consuming process.

A bond is mandatory. If done ex parte, as is often done in financial exploitation cases, the TRO cannot exceed ten days and can be lifted by opposing counsel within two days of filing the request. A TRO is only binding upon the parties to the action and those who receive actual notice (ie, service) of the TRO. Once again, the plaintiff may not know who else is involved in the exploitation or what financial institutions may have or have had the funds, so they will not be bound by the TRO.

Most of this also applies to preliminary injunction but there are two additional hurdles. First, it may take up to sixty days before a hearing can be held. Often, you cannot wait that long. Second, a plaintiff must demonstrate a “strong likelihood of success on the merits” which again brings us back to the difficulty of proof – the exploiter, not the plaintiff, is the one with all the requisite information at this point.
Conservatorship

With all of these stumbling blocks in mind, it is much better to request relief from the probate court that can invoke its equitable powers. ARS 14-1103. A probate court has specific statutory authorization “to make orders, judgments and decrees and take all other action necessary and proper to administer justice”. ARS 14-1302. See also ARS 14-5402(2). I like the flexibility afforded a conservatorship since we often do not know exactly what may have happened.

At this stage, I frequently counsel clients to seek a conservatorship to simply ascertain what damage has been done. Prior to initiating a conservatorship proceeding, it is often difficult to obtain information on behalf of the exploited person. Banks and financial institutions are as much a cause of the problem as they are a solution. Unless a power of attorney exists that satisfies the vicissitudes of bank personnel, no information will be provided to the child (or attorney) of an exploited person. Once a conservator is appointed, this obstacle is eliminated. It has been my experience that banks become extremely cooperative with conservators. I suspect this is often an attempt to get into the good graces of the conservator and avoid being named as a defendant in an exploitation action since a bank can be liable if it knew or should have known that the exploitation was occurring.

A probate proceeding is also preferable because the attorney is in a familiar environment with judges and commissioners who have experience in financial exploitation cases who are likely to be sympathetic and very inclined to grant the relief sought.

It may sound cynical but this is due in large measure to what I call the “front page of the Sunday edition of the Arizona Republic” test. It seems inevitable that, every several years, a quasi-scandal will erupt in the probate court where a fiduciary is alleged to have stolen hundreds of thousands of dollars from unsuspecting wards. It makes a great news story and the story line will inevitably raise the question of where was the probate court and how could this rank injustice have happened under court supervision? No judge (or commissioner who wants to become a judge) wants to be saddled with this potentially career-ending embarrassment.
As a result, do not hesitate to voice all of your concerns even if you do not have concrete proof of your allegations. Make sure to do this in the pleadings and not simply in an oral avowal in open court since most probate matters do not have a court reporter and the new recording system may not as infallible as advertised. A record needs to be made that clearly indicates the nature of the concerns. It is always better to do this in writing since you can never be sure how the hearing will proceed and I have appeared before judges, usually those with extensive trial experience, who may make it difficult for you to make an adequate record during the hearing. In other words, you must make sure that a court cannot later hide behind the lack of a record. You are much more likely to obtain the relief sought if it is apparent to the judge that an extensive record is being made by you. Cynical but true.

Another benefit of seeking a conservatorship is that counsel will be well acquainted with the procedural aspects set forth in ARS 14-5401 et seq. Seeking the appointment of a conservator is not, from a procedural standpoint, much different from the usual conservatorship proceedings. The pleadings are not significantly different other than explaining the nature of the exploitation. See the attached conservatorship petition.

The main difference that will be encountered is that the petition will be on an emergency basis. Conservatorship pleadings come in three varieties – emergency, temporary and permanent. The conservatorship statutes have almost no mention of an emergency appointment and do not define the term “emergency”. ARS 14-5401.01(a).

In Maricopa County, the probate courts seem to require a showing of an immediate need that was not caused by the person’s own mistake (i.e., do not seek an emergency appointment the day before a real estate closing is to occur).

In Maricopa County, a hearing for an emergency appointment will usually be held within a couple days of filing. The hearing on a temporary appointment will usually be held in about two weeks after filing. The hearing on a permanent appointment will usually be held about six weeks after filing.

As with any probate proceeding, counsel must be well acquainted with notice requirement and other procedural traps. See my attached materials regarding common mistakes in guardianship and conservatorship proceedings.
Make sure that, in your pleadings, that the court is asked to order the alleged exploiter to produce whatever records they may have relating to the exploitation. Many times, this is the only way to retrieve them and opposing counsel, in an attempt to look cooperative, will state they will gladly produce the documents.

Subpoenas

One of the biggest benefits of having a pending court proceeding is the availability of subpoena power. Many times, this is where a financial exploitation case is won or lost. It is all about documentation – if you can get a copy of the $25,000.00 check that the agent/son wrote to himself on mom’s account, the case is pretty much over given the burden shifting that the law of fiduciaries affords. Once a conservator has been appointed or a TRO has been granted, the use of subpoenas can often bring the case to a relatively quick end.

I do a two-step process. First, I issue a subpoena for the monthly statements for the time in question, which will be at least a year. Be sure to provide as much information as you can within the subpoena – account numbers, SSNs, dates of birth, addresses during the time in question. Give the bank at least 45 days to respond. Copy all parties on the subpoena. I always include a cover letter to the parties asking them to provide me with any relevant information they may have, to include the information sought in the subpoena. This will also give you additional ammunition against the exploiter if they had this information and did not give it to you, given the fiduciary duties. It also puts other family members at ease knowing that tangible progress is being made in trying to sort out the situation. It will also indicate to the family members that the sorting-out process will take weeks or months and not days, so that no unreasonable expectations will be created.

I will also submit similar subpoenas to credit card companies and to any other institution or company that may have had questionable transactions with the exploitee.

Also note that, in some outlying counties, a praecipe is still required to issue subpoenas.
Once I get a response to the subpoena, I examine the statements for any unusual activity, mainly large withdrawals. I meet with the client to get their input since the monthly statements do not give much detailed information other than the amounts involved. One exception is any electronic payments that were made. I again copy all family members so that they can see for themselves the nature of the problem. Many times, a family member does not want to believe that their brother or sister took advantage of their parent. When they see it for themselves, especially the amounts involved, the skepticism quickly disappears. Do not overlook the importance of the family dynamics in these cases.

Once we determine which transactions appear questionable, my second step is to issue another subpoena listing each transaction and asking for copies of checks and other transmittal information for each transaction. I again provide for forty-five days to respond but, on the second request, the financial institutions usually respond much quicker than the first time. Many times this is because there is a transaction number on the monthly statement. Providing this number will speed things up considerably.

When copies of the checks arrive, it will usually be very apparent whether a case of exploitation exists or not. Some of the transactions may be legitimate and the children were not aware of them, such as medical bills.

But if the checks are made payable to the exploiter, then case takes on a whole new dimension. As the cases cited in Part 1B indicate, a fiduciary who has been self-dealing has the burden of justifying the transactions. The spotlight is now on the exploiter, right where you want it to be.

As for the court proceeding, I will file a status report with ample attached copies of the checks and other proof of exploitation for the judge to see. The case will then usually take a dramatic change because the judge will take a much more active role, often without any request from me.

Many times this will involve show cause orders, which is a shot across the bow of the exploiter. If you are representing the exploiter, this is when big decisions need to be made. If the exploiter will not comply with the court’s order, anything can happen. If this is a problem, the exploiter will normally assert that he is very busy and needs more time
to comply with the order. This is very dangerous since the court will likely grant him more time to do so – while in the county jail.

It is at about this time that third parties, primarily banks and title companies, need to be brought into the case. Usually, they will do so voluntarily by entering an appearance. Occasionally, they will file an interpleader action under Rule 22 of Civil Procedure that will be consolidated with probate action or they will seek permission to deposit funds with the court under Rule 67 of Civil Procedure. Or a complaint can be filed against the bank or other third party within the existing probate action alleging a constructive trust and other theories regarding the wrongful possession of the funds or other property.

If real estate is involved, a lis pendis should be filed but only as to the particular parcel in question. ARS 12-1191. See the attached lis pendis filing. But note that ARS 33-420 provides that anyone “knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid is liable to the owner or beneficial title holder of the real property for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action”. The test is not whether the person filing the lis pendis actually owns or has an interest in the property in question but whether the person knew or should have known that there was no cognizable claim in the property. City of Mesa v. Smith Co., 169 Ariz 42 (CA1, 1991).

Subpoenas -- Medical Records and HIPAA

If there is an issue as to the exploitee’s mental capacity necessitating access to medical records, HIPAA will rear its ugly head. The privacy rules of the Health Insurance Portability and Accountability Act of 1996, 42 USC 1320d and 45 CFR 160-164, sets forth the process for obtaining medical records through court orders. Disclosure is permitted in response to a court order but is limited to that information “expressly authorized” by the order. 45 CFR 164.512(e)(1)(i)

This means care must be used in two aspects. One is the obvious need for greater specificity in a court order. The second point is to make sure the order complies with the
civil procedure rules. For instance, this will usually require that the judge sign the order. A minute entry or a pleading issued by the court clerk is not sufficient.

The process for obtaining medical records through the issuance of subpoenas has also been greatly impacted by HIPAA yet it has received surprisingly little attention in Arizona. The requirements are quite lengthy and detailed and will require considerable additional efforts by the attorney issuing the subpoena. The thrust of the HIPAA regs in this regard mandate that the health care provider who has been served with a subpoena must be given “satisfactory assurance” by the attorney issuing the subpoena that “reasonable efforts” have been made to notify the patient of the request made in the subpoena. 45 CFR 512(c)(1)(ii)(A)

The regs are very specific about what must be provided. Accompanying the subpoena must be a written statement setting forth the following:

a. a good faith attempt was made to provide written notice to the patient or, if the patient’s location is unknown, that a notice was mailed to the patient’s last known address.

b. the written notice contained sufficient information about the litigation to permit the patient to raise an objection

c. the time to raise an objection has elapsed, and

d. no objections have been filed or that any objection has been resolved.

The regs also provide for an alternative method of proving satisfactory assurance by means of a “qualified protective order”. 45 CFR 164.512(e)(1)(iv). This order can be either issued by the court or entered as a stipulation by the parties. Its terms must prohibit the parties from disclosing the medical records for any purpose other than for the litigation and, after the litigation has ended, the parties must agree to destroy all copies of the records or return them to the health care provider.

The applicable Arizona statute is ARS 12-2294.01, which has been amended twice in the past two years to attempt – in my opinion, unsuccessfully – to incorporate
HIPAA requirements. Be aware of the federal authorities when issuing subpoenas. Simply following the Arizona statute is probably not enough.

There are many aspects of HIPAA that are not covered by these materials. The best source of information is the “OCR Privacy Brief, Summary of the HIPAA Privacy Rules” found on the HHS’s website, www.hhs.gov/ocr/privacysummary.pdf, which has nearly 500 FAQs and many useful links. There is also an excellent HIPAA web blog, located at http://hipaablog.blogspot.com.

Order To Show Cause

This is where it gets ugly. Usually, removal and/or surcharge of the fiduciary is sought. This is easier said than done.

Cause for removal and/or surcharge of a fiduciary is quite broad, usually couched in terms like “best interests of the estate”, breach of fiduciary duty or fraud/misrepresentation. See ARS 14-3611, 14-3709(b), 14-5429 14- 7301 et seq.

Procedurally, it is easy to get tripped up if the practitioner is not intimately familiar with the procedural rules. If a probate has been opened, a verified petition for order to show cause is filed. If no probate proceeding is pending, a new cause of action must be commenced which means the filing of a complaint. An OSC petition is usually a motion that means an underlying action has already been filed. Either way, the first hearing is only a return hearing – nothing more than a ten-minute status conference. Do not have a parade of witnesses scheduled since there will be no evidentiary hearing.

Don’t forget to notice the surety if a bond has been posted. A surety is jointly and severally liable with the fiduciary. ARS 14-3606(a)(2) & -5412(a)(1). Notice must be served on the surety, either upon its statutory agent or the Department of Insurance. ARS 14-3606, 14-5411 & -5412, 14-7304. A surety does not defend a fiduciary in the manner that an insurance company does for an insured. The surety will always be represented by separate counsel and can raise defenses that a fiduciary did not, so inclusion of a surety at the outset is often, but not always, the best course of action. Any OSC petition should include a consideration of whether an allegation of breach of fiduciary is appropriate
since a judgment for breach of fiduciary duty is not dischargeable in bankruptcy. 11 USC 523(a).

If financial exploitation is been alleged, a settlement is much more likely when the alleged exploiter is informed of the draconian penalties that can be imposed under the statute dealing with financial exploitation of a vulnerable adult, ARS 46-456. The penalties include mandatory forfeiture of an inheritance, treble damages, punitive damages, attorney fees and court costs.

Removal or Surcharge

Removal of the fiduciary may be appropriate if it would be in the best interest of the estate, ARS 14-3611 & –5415 or if waste, embezzlement or mismanagement by a fiduciary is proven, then removal. Barth v. Platt, 52 Ariz 33 (1938).

A surcharge may also be sought. ARS 14-3808(d), -5429(d) & -7306(d). It is usually captioned as a “Petition For Surcharge” and sets forth the facts alleging the wrongdoing. Standard allegations include breach of fiduciary duties, constructive fraud and a demand for an accounting. Also request that the sum be considered liquidated when the amount is determined, that pre- and post-judgment interest be awarded, that compensatory damages be awarded to include an anticipated return on investment that was not realized due to the wrongdoing and to award punitive damages.

Petition For Instructions

If you are representing a fiduciary and the fiduciary is in doubt on the proper course of action, the easiest and best procedure is to file a petition for instructions. In The Matter of CVR Irrevocable Trust v. Retter, 202 Ariz 174 (CA1, 2002). This is simply a petition setting forth the quandary that the fiduciary is in and seeks guidance or approval from the court for a particular course of action. This author has successfully used this petition many times for authorization for gifting, either for ALTCS or estate tax purposes.
Fee Applications

You have fought a wonderful and meritorious fight. Now it is time to get paid.

All probate practitioners are aware of Local Rule 5.7 of Maricopa County Superior Court that governs the fee application process. This author has noticed several misunderstandings regarding the fee approval process. First, there is no statutory requirement that a fiduciary or the attorney seek court approval. Rule 5.7 simply sets forth the procedure to be followed if court approval is sought.

Second, the fee application process needs to be placed on the court calendar. This, for some reason, seems to be shrouded in mystery – court staff has frequently mentioned that they are unsure what to do with a fee application. The simplest and best way is to schedule the matter for a non-appearance hearing. In Maricopa County, this is done through court administration.

Third, the fee application is often an educational experience for the beneficiaries, many of whom have never been in court or probate court before. The itemization should be very detailed since clients and families often do not realize the amount of work that has been done outside of their presence. For an extremely helpful book on how to write an invoice, read “How To Draft Bills Clients Rush To Pay” by J. Harris Morgan and Jay G. Foonberg, written by two of the most business savvy lawyers in America and available on the ABA website.

Fourth, if the fees have arisen from a litigated probate, practitioners need to be aware of the recent case of Matter of Estate of Gordon, 207 Ariz 401 (CA1, 2004) in which the Court of Appeals reversed the trial court by emphasizing that the standard for reviewing fiduciary and attorneys fees was of good faith, and not what was in the best interests of the estate. ARS 14-3720.

Finally, a party challenging a fiduciary is generally not entitled to fees. Matter of Estate of Groves, 163 Ariz 394 (CA2, 1990). There is a long line of cases holding that attorneys fees arising from a breach of contract, ARS 12-341.01, do not apply in a probate or trust setting. See, most recently, Matter of Naarden Trust v. Keiber, 195 Ariz 526 (CA1, 1999). In a guardianship proceeding, practitioners need to advise their clients
that, in a contested matter, the losing party will liable to the alleged ward for fees. ARS 14-5314.