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Asset Protection and Rising Financial Abuse of the Elderly

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Sadly, financial abuse of the elderly is becoming more common. By some estimates, the number of cases involving financial abuse of the elderly now exceeds the number of elder abuse cases involving physical abuse and neglect.

Predators abuse trust

Oftentimes the people who prey on the elderly are family members, neighbors, or caregivers whom the senior trusts and depends on. When the predator has only a passing acquaintance with the victim, he will insinuate himself into his victim's life in order to gain the victim's trust and confidence. Either way, once the hooks are in, the predator will have the victim give him power of attorney, transfer real estate and bank accounts into his name, or change his will to leave all his assets to the predator.

Sometimes, financial abuse of the elderly occurs in the context of commercial transactions. Such cases often involve the sale of unnecessary or extremely expensive life insurance policies, annuities, reverse mortgages, and long-term health plans.

More comprehensive protection needed

Although legislation meant to protect seniors from elder abuse has been in place in California since 1982, advocates for the elderly have been lobbying for years for passage of laws with more comprehensive protections for seniors. The passage on Senate Bill 1140 on January 1, 2009, was a huge step in protecting California seniors from elder financial abuse.

One of the most significant aspects of Senate Bill 1140 is that it expands the definition of financial abuse to include undue influence. Undue influence is defined as taking unfair advantage of a person's weakness of mind or the confidence the person has in the perpetrator. Prior to passage of Senate Bill 1140, the only remedy available to a victim of elder financial abuse was rescission. Unfortunately, rescission was an inadequate remedy because it did not allow the victim to recover damages and attorney's fees. By including undue influence as the basis for a claim of elder financial abuse, the legislature has enabled victims to recover damages, attorney's fees, and costs.

Senate Bill 1140 also expands the rights of victims of commercial elder financial abuse. Previously, rescission was the only available remedy. However, Senate Bill 1140 requires the perpetrator of commercial elder financial abuse to return any property taken from a senior who lacks capacity. Failure of the perpetrator to return the property entitles the victim to recover damages, attorney's fees, and costs.

"Wrongful use" definition may change

Arguably, the most striking change effectuated by Senate Bill 1140 is to the definition of the term "wrongful use". Pursuant to Senate Bill 1140, "wrongful use" means the taking of a senior's property where the predator knew or should have known that taking the property would be harmful to the senior. In the context of commercial transactions, not only is the sales person prohibited from making material misrepresentations to an elderly customer, he is prohibited from making the sale if he knows or should know that it is likely to harm the customer.

Senate Bill 1140 makes other significant changes to California's body of law meant to prevent elder abuse. These changes include:

- Recovery of consequential damages;
- Vicarious liability for employers;
- Imposition of attorney's fees against employers for the wrongful conduct of employees in the course and scope of their employment; and
- A four year statute of limitations which begins when the plaintiff discovers or should have discovered the facts, circumstances, and/or events amounting to financial abuse.

Practicalities and financial elder abuse

Having spent a lot of space discussing the legal aspects of financial elder abuse, I'm going to take a few moments to touch of a few practicalities. The fact of the matter is that sometimes people make [decisions in planning their estates] that their families do not like, understand, or agree with. Maybe there has been a breakdown in the familial relationship or maybe the senior is eccentric.

Regardless of the reasons a senior makes the testamentary decisions he does, challenging a will is a very complex and expensive undertaking. If the heirs challenge the will, they must prove undue influence or diminished mental capacity before a judge will set aside a will.

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I am a Palo Alto estate planning attorney representing clients in San Francisco County, Santa Clara County, San Mateo County and the surrounding areas. If you have questions about elder financial abuse or other California estate planning or California probate matters, please post it here or contact the Law Offices of Janet Brewer >>