

Estate and Elder Law

Financial exploitation of the elderly



By William P. Isele

My name is Maribel. I am 84 years old. Divorced from my husband in 1968, I have lived alone for nearly 40 years. My only daughter, Jennifer, married that nice Naval officer, and set off to see the world. Where are they now, Okinawa? For years, I immersed myself in garden clubs and civic activities; I even served a few years on the borough council in my local town. In the past few years, however, many of my lady friends have passed on, and the young mothers today all seem too busy with their jobs and families. Yes, I get lonely. My hearing is not too good and could I be getting cataracts like my mother had? No, my eyes are just tired. Sometimes, when the arthritis flares up, I can't even pick up my gardening tools, much less use them. I know I need help around the house, and thank goodness for Karl.

It must have been fate that day I met Karl at the garden shop. A man in his 40s, down on his luck, recently divorced (I know what that feels like!) He couldn't get that beat-up old pick-up started, and asked me for a ride to the service station. On the way, we passed my little house, and I bemoaned the brown spots in the lawn. "I could help out," said Karl. Such a nice young man!

The word on his old truck wasn't good. Coolant was leaking into the engine — \$4,000 to \$5,000 at least. Poor Karl. His ex-wife had ruined his credit and there was no way he could afford a new truck. Then an idea struck! I could buy a truck, and Karl could use it to do the landscaping I had been neglecting! Was it my idea or his? No matter. I had the money, so why not?

Over the next few weeks, Karl was always around, planting, fixing, doing all sorts of jobs that needed doing. He and the truck would be gone for long periods, but what did it matter? My little house looked so nice, and the garden — well, it was splendid! Karl often drove me to the store, and the bank and such. He even walked me into the bank and held that heavy door. Such a gentleman! As fall approached, I saw less and less of Karl. I bought him a nice cell phone so I could call if I needed him. He always came to drive me to the bank. He preferred to be paid in cash for his landscaping work. Said that way his greedy ex-wife wouldn't find out he was working.

Then winter came and that terrible bout with bronchitis. Karl came and drove me to the hospital. So many questions, so much paperwork. Karl was so sweet — he got one of those power-of-attorney



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forms for me to sign, because it was all so confusing. He'd handle everything! What a relief!

Bronchitis turned to pneumonia, and I was in the hospital a long time. The doctors said I would need physical therapy, and not to worry because Medicare covered 20 days. Twenty days rehab at St. Joseph's — I used to know a nurse who worked there — didn't sound so bad. Another two weeks have gone by and I'm meeting with the social worker at St. Joe's. A nice girl, but so young. And she's talking nonsense. What does she mean, I sold my house? Why would I do such a silly thing? And my bank accounts. I'm not senile — I know I have \$100,000 in my savings at First Bank and about \$55,000 or \$60,000 in the Trust Company — Karl's truck cost about \$45,000, I think.

Karl! Karl will straighten all this out...

You know where this is heading, don't you, dear reader? "Karl," the truck, the proceeds from the house, and the bank accounts have all disappeared. Poor Maribel is homeless, penniless and may even have problems qualifying for Medicaid. This is financial exploitation.

Financial crimes against the elderly are generally considered to fall into two categories: fraud committed by strangers and financial exploitation by relatives and caregivers. These categories are not discreet, and sometimes overlap. As in the case of Maribel and Karl, a clever stranger often can become a trusted caregiver.

Whether a family member, or a stranger who insinuates himself into the life of an elderly person, a financial exploiter has a position of trust and an ongoing relationship with the elderly person. Exploitation occurs when one person uses another person or his or her resources for the first person's profit or advantage, without legal entitlement to do so. *N.J.S.A. 52:27G-2(e)*. Methods of financial exploitation can include:

- Outright theft of the elder's money, property or valuables;
- Borrowing money and not paying it back;
- Denying medical care and services to conserve funds;
- Selling or gifting the elder's possessions without permission;
- Signing or cashing pension or Social Security checks;
- Misusing ATM or credit cards;
- Compelling or tricking the elder to sign over property.

Exploiters can employ deceit, coercion or emotional abuse. Most frequently, they simply try to isolate the victim from family, friends and other sources of help. People are busy and wrapped up in their own lives. If it doesn't seem that an elder is in need of assistance, they are less likely to inquire about her well-being or relationship with the exploiter. An alert bank teller, for example, may have become concerned if Karl suddenly showed up and started withdrawing money from Maribel's accounts. But, by accompanying her to the bank, he became a "familiar face," less likely to generate alarm. Not only does this isolation technique prevent the elder from consulting with others about important decisions, it often gives the elder the impression that no one else cares about him or her.

The financial and legal arrangements most often exploited by relatives and caregivers are:

■ **Joint bank accounts.** This is probably the most difficult form of financial exploitation to combat or prosecute, because the offender becomes a legal co-owner of the account. Often a family member, caregiver, or trusted "friend" will convince the elder that he or she needs assistance with financial affairs, and has his or her name added to the elder's bank account. From that point on, the exploiter has full, legal access to the account and can withdraw at will. This type of exploitation can only be combated by demonstrating that the

elder did not understand what he or she was doing, which is extraordinarily difficult. **Important:** Since either party has access to the entire account, Medicaid may presume the entire account to be a resource available to the elder when he or she applies for Medicaid. Withdrawal by a joint account holder may be considered an "asset transfer," resulting in a period of Medicaid ineligibility (see below). Medicaid even makes a distinction between "and" accounts and "or" accounts, so there are many pitfalls for the unwary. See: *N.J.A.C. 10:70-5.2(f)* and (g).

■ **Deed or title transfer.** The exploiter convinces the elder to transfer ownership of property, such as homes, real estate or vehicles to the exploiter. Today's people over 80 lived through the Great Depression and heard stories about relatives losing everything. Many elders have long-since paid off mortgages on their homes, but face property tax bills higher than any mortgage payment they ever saw. Exploiters can play on these fears to convince the elder that the property will be "safer" in their names. Again, this is a difficult form of exploitation to combat or prosecute, if the elder is not incapacitated at the time of the transfer.

■ **Power of Attorney.** This is one of the most dangerous legal documents a person can sign, and one of the most useful tools in the toolbox of a financial exploiter. A power of attorney gives one person (the "agent" or "attorney in fact") the authority to manage the affairs of another (the "principal" or "grantor"). There is no single form of power of attorney, and it can be as narrow or broad as the grantor allows it to be. When used properly, the agent can make decisions in the principal's best interests. It becomes a tool of exploitation when an agent induces the elder to sign a very broad power, and then uses it, as Karl did here, to make decisions or transactions that benefit the agent, to the detriment of the elder. Frequently, the agent obtains

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the power at times of stress, when the elder may no be thinking clearly, as in the case of Karl and Maribel. Prosecutors can be reluctant to pursue misuse of a power of attorney, because the agent has the ostensible authority to do what he or she has done, *i.e.*, it is not “without legal entitlement.” However, the New Jersey Supreme Court has made it clear that a power of attorney does not authorize an agent simply to make off with the principal’s money.

In *State v. William D. Kennedy*, 61 N.J. 509 (1972), the court was confronted with a power of attorney document, on a bank’s form, that relieved the bank of the duty to inquire whether any transaction was in the principal’s best interest. Willing to absolve the bank of responsibility, but not the exploiter, the court said:

In short, the instrument was the means whereby the agent was able to get his hands on the moneys, but when the moneys were thus obtained, the agent received them as agent for the principal, and the fraudulent appropriation of the moneys thus obtained to his own use constituted embezzlement. In other words, it is no defense to embezzlement that the moneys reached the agent with the consent of the principal. On the contrary, such entrusting is the necessary setting for the crime. ...[I]t is no defense to embezzlement that the victim trusted the culprit. *Kennedy* at 512-513.

Financial exploitation of the elderly may have repercussions beyond the loss of the elder’s assets or resources, devastating as that alone may be. In February 2006, Congress enacted the *Deficit Reduction Act* (PL 109-171, Senate Bill 1932, §6011 *et seq.*) which, among its other provisions, made several changes in the Medicaid eligibility rules. Medicaid agencies are now authorized to “look back” five years for any asset transfers that may have been for less than fair market value. As in the past, once the

Medicaid agency identifies such a transfer, it can assess a period of ineligibility, during which the applicant is ineligible for Medicaid benefits. Under the new law, however, that period of ineligibility does not commence until the applicant would otherwise be eligible for Medicaid benefits and is receiving institutional care. What this means, in Maribel’s case, is if the county Board of Social Services determines that Maribel’s “gift” of a \$45,000 truck, her house, her savings, or any part thereof, was an asset transfer for less than fair market value, she could be ineligible for institutional Medicaid for months or even years. If she requires long-term care how will she pay for it? Absent a hardship waiver, she will not be able to pay. As a practical matter, such a harsh result is unlikely, but it is possible.

Financial exploiters do not always resemble Karl, the helpful stranger who insinuates himself into an elder’s life. Otherwise well-meaning adult children may feel they are entitled to the elder’s property — it’s their inheritance after all, isn’t it? Even siblings who are elderly themselves have been known to misappropriate assets to their own use. In a 1997 report, the National Center on Elder Abuse stated that adult children are the most frequent abusers of the elderly, and this category experienced the biggest increase from 1990 to 1996. Other family members and spouses ranked as the second-most likely abusers of the elderly. Tatara, T and Kuzmeskus, L, “Trends in Elder Abuse in Domestic Settings.” *Elder Abuse Information Series, No. 2*. National Center on Elder Abuse, 1996, updated 1997.

What can be done? Since these crimes are so difficult to prosecute, prevention is the key. Attorneys who advise or draft documents for elderly clients must be particularly scrupulous to ascertain and understand clearly who their client is. Conflicts of interest in this area may be subtle, but they are no less real. If there is any doubt, consider referring the

elderly “client” to an experienced elder law practitioner. Exploiters may bring elders to attorneys to have documents drawn, such as wills, deeds, and powers of attorney. The attorney who is representing the elderly client should meet with the client separately from any other person, regardless of who is paying the lawyer’s fee. Attorneys in this circumstance need to be alert to signs that the elderly person may not completely understand the nature of the transaction. The attorney should carefully explore with the elderly client all the legal repercussions of any proposed action.

A recent California law requires employees of banks and credit unions to report suspected financial elder abuse to Adult Protective Services or law enforcement authorities. *The Financial Abuse Reporting Act*, SB 1018, effective Jan. 1, 2007. This law requires bank tellers and officials to be trained in how to recognize elder financial abuse, and how to report it. Similar legislation in New Jersey would go a long way toward supporting the efforts of county APS agencies and the state Office of the Ombudsman for the Institutionalized Elderly in combating financial exploitation.

Prevention is certainly the most desirable approach to dealing with the serious problem of financial exploitation of the elderly. However, professionals should not hesitate to contact law enforcement whenever financial exploitation of an elderly person is suspected.

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