

Protecting

Help
clients who
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the Elderly[®]

BY DOUGLAS CHALGIAN

Elders are often frail, trusting, or lonely. As a result, they are frequently targeted for financial exploitation. Vulnerable elders are exploited by telemarketers, door-to-door salespersons, neighbors, and family members, just to name a few. Attorneys in a busy elder law practice will frequently learn that their clients have been financially exploited. Then the attorneys will have to decide whether anything should be done to correct the wrong that has already occurred, or whether it is best to focus efforts on protecting the elder from exploitation in the future. In some situations, elder law attorneys may want to refer the matter to adult protective services, the county prosecutor, the attorney general, or some other appropriate regulatory agency. The purpose of this article is to provide guidance to attorneys considering whether and how to bring such actions.

Elder law litigation is a hybrid. It is not probate litigation, although many legal concepts that were developed in the context of probate proceedings may come into play—concepts like undue influence and lack of capacity. It is not personal injury work, although the elder law attorney may file tort actions, make jury demands, and seek exemplary damages. As a result, forming a plan for action will often involve mixing and matching concepts from various areas of law to come up with a strategy that fits the client and the facts of a particular case.

Identifying the Court

When faced with an exploitation case, the elder law attorney will first have to decide what court has jurisdiction: probate, circuit, or both. The answer is not always clear. For instance, while actions between “incapacitated individuals” and their court-appointed fiduciaries would have to be brought in probate court, actions by “incapacitated individuals” to recover assets converted by agents appointed by them under a power of attorney could be brought in either probate or circuit court. Meanwhile, elderly persons who have not been declared incapacitated by the probate court can sue their agents only in circuit court. To further complicate matters, there are situations in which an elder law attorney may want to go to probate court to open an estate in order to have authority to initiate an action in circuit court.

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In Michigan, circuit court is the general trial court. As such, circuit courts have subject matter jurisdiction over all matters except those statutorily exclusively assigned to another court.¹ Probate court has exclusive jurisdiction over internal affairs of trusts, decedent's estates, conservatorships, and guardianships.² In addition, probate court has concurrent jurisdiction (with circuit court) over other matters that are "in regard" to the estate of a decedent, protected individual, ward, or trust, including actions to determine property rights, impose a constructive trust, decide a claim by or against a fiduciary or trustee for the return of property, decide a contract claim by or against an estate, and compel and settle accounts of agents under a power of attorney.³ Civil actions, which would otherwise be heard in circuit court, but where damages are less than \$25,000, are statutorily assigned to district court.⁴

Probate v Circuit Procedures

There are significant procedural differences between probate and circuit courts. For instance, in circuit court, all actions are initiated with a "complaint."⁵ The person who initiates the action is the "plaintiff," and the person who responds is a "defendant." Complaints can also be filed for some types of actions in probate court. But in probate court, some matters must be called "proceedings" and must be initiated by filing a "petition."⁶ The person who initiates a proceeding is a "petitioner." The person who responds is called a "respondent."

When a complaint is filed in either court, the "action" is governed by the general court rules. When a petition is filed, the probate court rules control. This distinction may be significant. Probate court rules require petitioners to give notice to "interested persons," typically close family members of the person being protected. Discovery in probate court proceedings is limited to matters raised in a petition pending before the court.⁷ Discovery in circuit court may be conducted with respect to any unprivileged matter that appears reasonably calculated to lead to the discovery of admissible evidence.⁸

The availability of a jury to decide matters can be impacted by the choice of court

and the nature of the action. In circuit court proceedings, which are legal in nature (as opposed to equitable), a jury is always available.⁹ In probate court, the jury availability question is more confused. MCL 600.857 provides that a jury is available in probate court to try factual matters, which could have been tried to a jury upon appeal from probate court to circuit court prior to 1971. While practitioners seeking a jury trial in probate court will need to research their specific issue before filing a jury demand, as a practical matter, the law has developed so that most fact issues in most legal actions may be decided by a jury in probate court.

Choosing a Theory

Probably the most difficult decision an attorney will have to make in deciding how to proceed in a financial exploitation matter is deciding which legal theories are best suited to the facts of the case. This decision will have to be made taking into account the other procedural issues discussed above. While both circuit and probate courts have legal and equitable jurisdiction over matters before them, some forms of action are better suited to one court over the other. Following is a brief discussion of some of the most common forms of action that arise in financial exploitation cases.

Accounting

An action for an accounting is a demand for detailed financial information regarding activities of a fiduciary. An action for an accounting may be brought in either probate

or circuit court, depending on subject matter jurisdiction considerations discussed above.

When demanding an accounting, the plaintiff or petitioner should be specific as to the period of time to be covered and as to the amount and type of information needed. An accounting may be an action in and of itself, demanding recovery of assets that cannot be properly accounted for. Alternately, a demand for an accounting may be used as a method for obtaining information and records, following which an action for damages may be brought.

Breach of Fiduciary Duty and Surcharge

Breach of fiduciary duty is legal action for damages brought against someone who is acting in a "fiduciary capacity" and arising out of the fiduciary's failure to adhere to the appropriate standard of care.

Michigan law broadly defines *fiduciary* as follows:

*A fiduciary relationship exists when there is reposing of faith, confidence and trust and the placing of reliance by one upon the judgment and advice of another.*¹⁰

As a result, it is not necessary that the person accused of exploiting the elder be serving in any formal fiduciary capacity. Bringing a claim of breach of fiduciary duty opens the door to some significant procedural opportunities.

Michigan law requires that a person acting in a fiduciary capacity be held to a very high standard of conduct.¹¹ When it is established

Fast Facts:

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Conversion is an act of dominion wrongfully asserted over personal property of another.

A constructive trust is not a form of action, but rather, a form of equitable relief, which allows the court to impose a trust for the benefit of one person over assets owned by another.

Rescission is an equitable action, which seeks to set aside a contract or transaction. The basis for rescission could include lack of capacity, undue influence, or fraud.

that a fiduciary relationship existed, and the person acting as fiduciary engaged in a transaction in which the fiduciary benefited at the expense of the elder to whom the fiduciary duty was owed, Michigan law creates a rebuttable presumption that the transaction was the result of undue influence.¹² Exemplary damages may be sought in an action for breach of fiduciary duty.¹³

In cases where the person who engaged in wrongdoing was serving as a fiduciary pursuant to a probate court appointment, or as a trustee, the action will likely be brought as a "surcharge" action in probate court. Michigan law allows a probate court to hold a court-appointed fiduciary personally liable for damages to the ward's estate, when the fiduciary has acted in bad faith.¹⁴

Conversion

Conversion is an act of dominion wrongfully asserted over personal property of another. Michigan law provides for treble damages when a wrongdoer buys, receives, or aids in the concealment.¹⁵ Exemplary damages may also be available in an action for conversion.¹⁶

An action for conversion will often arise when the elder is unaware of being exploited. For instance, this can arise when the elder has allowed someone to become a joint owner on an account and that person then makes withdrawals without the elder's knowledge.

Constructive Trust and Unjust Enrichment

A constructive trust is not a form of action, but rather, a form of equitable relief, which allows the court to impose a trust for the benefit of one person over assets owned by another. Under Michigan law, a plaintiff may seek imposition of a constructive trust in any situation where equity would be served.¹⁷ An action for constructive trust is most appropriate when the wrongdoer has obtained legal title to identifiable property of the elder.

When the property obtained by the wrongdoer is not of a type that can easily be traced, comparable relief can be sought in an action for unjust enrichment. The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to plaintiff

because of the retention of the benefit by the defendant.¹⁸ If the elder is successful in an action for unjust enrichment, the court may impose an obligation on the wrongdoer as is necessary to prevent injustice.

Rescission

Rescission is an equitable action, which seeks to set aside a contract or transaction. The basis for rescission could include lack of capacity, undue influence, or fraud. In Michigan, capacity to contract is defined as "sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged. To avoid a contract it must appear not only that the person was of unsound mind or insane when it was made, but that the unsoundness or insanity was of such a character that the person had no reasonable perception of the nature or terms of the contract."¹⁹

Establishing undue influence requires a showing "that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency, and impel the grantor to act against his inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, are not sufficient."²⁰ However, as discussed above, when the individual alleged to have exercised undue influence was acting in a fiduciary capacity, a rebuttable presumption of undue influence will arise. Further, Michigan law recognizes that the level of conduct necessary to establish undue influence is a function of susceptibility.²¹

A court may also set aside transactions for fraud or misrepresentation. This arises when wrongdoers receive a benefit from a transaction in which they made a knowing misrepresentation of material fact upon which the elder plaintiff relied to his or her detriment.

Michigan Consumer Protection Act

In cases where wrongdoing is being engaged in under the guise of a trade or business, relief may be available through the Michigan Consumer Protection Act.²² Pursuant to the act, a defendant can be held liable for engaging in "unfair or deceptive

practices," terms that are broadly defined by the act, and practices that are frequently present when businesses aim high-pressure marketing techniques at vulnerable elders. In addition to money damages, the Michigan Consumers Protection Act allows for recovery of reasonable attorneys fees.

Conclusion

Given the rapidly growing population of aged persons, it is safe to assume that litigation involving the financial exploitation of elders will increase. The procedural considerations and legal theories offered above are designed to help attorneys analyze the merits of such cases and decide where and how to initiate such actions, if they decide to proceed. ♦



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Footnotes

1. Const art 6, § 13.
2. MCL 700.1302.
3. MCL 700.1303.
4. MCL 600.8301.
5. MCR 2.101.
6. MCR 5.101.
7. MCL 5.131.
8. MCR 2.302(B).
9. Circuit Court. Mich Const art 1, § 16. Jury not available in equitable proceedings. *Zurcher v Herveat*, 238 Mich App 267 (1999).
10. *Smith v Saginaw Sav & Loan Ass'n*, 94 Mich App 263 (1979).
11. See for instance: *Horvath v Langel*, 276 Mich 381 (1936); and *Reconstruction Finance Corp v Lee*, 290 Mich 328 (1939).
12. *Kar v Hogan*, 399 Mich 529 (1976).
13. *Green v Evans*, 156 Mich App 145 (1985).
14. MCL 700.1308(1); *Matter of Green Charitable Trust*, 172 Mich App 298 (1988), and *MacKenzie v Union Guardian Trust Co*, 262 Mich 563 (1933).
15. MCL 600.2919a.
16. *Larson v VanHorn*, 110 Mich App 369 (1981).
17. *Kent v Klein*, 352 Mich 652 (1958).
18. *Barber v SMH*, 202 Mich App 366 (1993).
19. *In Re Estate of Erickson*, 202 Mich App 329 (1993).
20. *Kar v Hogan*, 399 Mich 529 (1976).
21. *In Re Kanabls Estate*, 47 Mich App 299 (1973).
22. MCL 445.901 et seq.