

The Cat & Mouse of **Exploitation Litigation**



By Douglas G. Chalgian, CELA

©2020

In litigation involving the financial exploitation of a vulnerable adult, timing is often everything.

Let's say, for instance, that Dad really likes his new caregiver. So much so that he is "helping her out" financially. You smell trouble, and you're probably right. The question is what to do, and more to the point: when to do it. The same question comes up when the concern about exploitation involves a sibling or a new spouse.

What I tell clients in these situations is that sometimes it makes sense to keep your powder dry and play along until the facts are more favorable. There are risks with waiting, and those risks have to be considered. But there are also risks with running to court too soon.

Whether it's a caregiver, spouse, or child that is suspected of exploitation, when the target of that exploitation is aged but not clearly incompetent, the risk of acting too quickly is that you could end up with a court determination that the person is competent and free to do what they want with their money and their estate plan, and worse, you have given the bad actor just the ammunition they need to convince the vulnerable adult that you are against them.

Maintain access

One big benefit of sitting back and playing along is that it allows you to maintain access to the older adult and to information about their finances. By not directly confronting the bad actor, or chastising the older adult, you will avoid giving the bad actor the tools they need to convince the older adult to cut you off.

Isolation of the older adult, and alienating the older adult from those who would protect them, is a central feature in nearly all of these cases. The bad actor will seek to cause the vulnerable adult to believe that they are the one that they can trust, the one looking out for them, and that you are the one trying to get their money or trying to put them in a home. Preventing, or at least delaying, isolation plays to your advantage.

Don't rationalize with an irrational mind

You may think you can fix the problem by rationalizing with the older adult. But if the older adult is cognitively impaired, these efforts will likely not just be fruitless, but

misconstrued. The bad actor will twist what you said to prove to the vulnerable adult that you are up to no good. And typically, the bad actor has more time alone with the vulnerable adult, time that can be used to repeat themes and to create a perception of reality that benefits the bad actor's objectives. Competing with a bad actor over who can persuade an older adult to see it their way is rarely a winning strategy. The better strategy is usually to stay mum on the topic and keep conversations with the older adult and the bad actor light and non-confrontational.

Exploiters with benefits

It is also important to accept the fact that some forms of exploitation are self-inflicted. As I often tell clients: just because someone is old, doesn't mean they can't make bad decisions.

One big benefit of sitting back and playing along is that it allows you to maintain access to the older adult and to information about their finances.

It's a harsh reality that getting old is scary. Older adults are often forced to choose between two bad options. In some cases, the older person may be aware of the questionable motives of the bad actor, but may nonetheless be willing to accept those in return for getting something they want. Typically what they want is the ability to continue to have companionship or independence, or some semblance thereof. They don't want to live with their children or move to an assisted living facility. They want to go out to dinner, take trips, and engage in other "normal" activities. They may know that the person they are writing checks to is primarily interested in their money, and may only be pretending to care for them, but they may be willing to overlook those flaws for the sake of other benefits.

Courts can offer no remedy for families who watch an older adult get fleeced by a bad actor when the older adult fully comprehends what they are doing. In the eyes of the law, bad choices are not actionable.

Now

The time to start any lawsuit is when you have the best chance of prevailing. In these exploitation cases, the time to litigate will be ripe when the vulnerable adult is either so impaired that they will no longer be an obstacle to the litigation or when the actions of the bad actor are so egregious that they are inexplicable.

All, or almost all, forms of age-related cognitive impairment get worse over time. And often that timeframe for deterioration is a matter of months, not years. It is much easier to come to court and attack the questionable activities of an exploiter when the older adult is no longer able to logically explain what has been going on. The more impaired they are when a court gets involved, the more likely it is that a suitable remedy can be obtained.

Likewise, the timing may be right when the vulnerable adult has done something that cannot rationally be explained. For example, it is one thing for an older adult to pay a caregiver to take a trip with them, and even to bring along their children; but it is quite another matter to name the caregiver as the beneficiary on their retirement account.

Conclusion

This whole timing issue comes about because the laws we have for proving that someone should not be allowed to make their own decisions require the party seeking court intervention to demonstrate cognitive impairment with a high degree of certainty. But many adults who are vulnerable to being exploited still have a great deal of cognitive ability, and may not be so impaired that a court will intervene. As a result, I often advise clients to delay seeking court intervention and to wait and watch until a better opportunity to act presents itself. If this all sounds like a cat and mouse game, you're right. In many of these cases, that's exactly what it is.

ATTORNEY DOUGLAS G. CHALGIAN, *Chalgian & Tripp Law Offices*, is both certified in elder law by the National Elder Law Foundation and a Fellow with the American College of Trust and Estate Counsel. He has served as chair of both the Probate and Estate Planning and Elder Law and Disability sections of the State Bar.

Mr. Chalgian previously served on the Commission on Services to the Aging. He was one of about a dozen attorneys on the Michigan Trust Code Drafting Committee, and has been selected three times as one of the top 100 lawyers in Michigan by Super Lawyers Magazine. Mr. Chalgian writes and speaks regularly on the topics of estate planning, elder law, and probate court litigation.

