

Elder Exploitation Litigation in Nevada: A Model for Effective Recovery of Assets

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I. Introduction

Financial exploitation of our elderly is a common occurrence, and has been described as the fastest form of elder abuse.¹ This paper provides a framework for bringing an action to recover the assets or property under Nevada law. Nevada has one of the fastest growing senior populations, and recent legislation was enacted that provides for double damages and attorneys fees in cases involving abuse or exploitation of seniors.² In addition, there is a recent provision in the guardianship statutes that allows for a quicker recovery of assets within a guardianship action and provides for double damages. In addition, the other statute for attorney's fees may be used in conjunction with the guardianship statutes.

Statutes and case law pertaining to litigation of elder abuse varies among jurisdictions. This paper is intended to demonstrate an effective methodology for helping seniors recover assets. By doing so, it is hoped to encourage attorneys to advocate outside the courts for measures to protect seniors, such as laws allowing for recovery of attorneys fees, double damages, and a more speedy mechanism for recovery. These laws are needed to increase the likelihood that attorneys will handle the ever-increasing financial exploitation of the frail and elderly.

II. Initial Case Analysis and Immediate Steps to Take

A. Stop the Exploitation

One of the first steps to take is to stop further exploitation. If the victim is competent, then necessary documents can be executed. Such documents may include revocation of prior powers of attorney, appointment of new power of attorney, restructuring of bank accounts or amendments to trust documents to require some type of oversight by a trustworthy person or entity such as a professional fiduciary. However, many victims have questionable capacity.

The National Elder Abuse Incident Study (NEAIS or Study)³ discussed the attributes of victims of elder abuse. There was a high incident of individuals who suffered from physical and mental frailty. Almost 48% of the substantiated cases involved individuals who were unable to care for themselves. More than 31% of the victims were very confused or disoriented; the Study hypothesizes that six out of ten abuse victims suffer from some degree of confusion. Forty-five percent (45%) of all victims were found to suffer from some degree of depression.

In some situations, a guardianship or conservatorship may be warranted. However, many victims are reluctant to report the exploitation for fear that someone may supervise their decisions or they may be subjected to guardianship. Another step to consider is a referral to the appropriate agency, such as Senior Protective Services.

B. Preliminary Case Analysis

One of the difficult aspects of financial exploitation cases is that the exploiter has frequently squandered the assets. Even if there is a high probability of victory in court,

the hard work of obtaining a judgment may not be worth the effort if there is no possibility of collecting on the debt.

Under the Nevada Revised Statutes, if a guardian has discovered that someone took money from the Ward, the guardian has an obligation to bring an action to recover assets, unless the guardian can demonstrate to the Court that the cost of the recovery action would exceed the amount recovered. Accordingly, the initial query is to weigh the attorney's fees and costs that would need to be expended versus what assets, if any, are available to recover.

If the exploiter has transferred real property, then typically the real property has enough value to warrant bringing the recovery action. It is important to immediately record a Notice of Lis Pendens on the subject real property to prevent the exploiter from encumbering the property. When there is a criminal case against an exploiter who transferred real property, the Abuse and Neglect Department of the Police urge the victim, or the victim's representative, to bring a civil action so that a Lis Pendens can be recorded.

Other temporary remedies are often needed to secure the property, such as a temporary restraining order. In one case, the exploiter used a power of attorney to take \$250,000.00 from a widow with dementia in the month her husband died. Using a subpoena to obtain bank records, approximately \$225,000.00 was directly traced to an account in the exploiter's name. In the guardianship action, we obtained an ex parte order to freeze that account in the exploiter's name.

C. Challenges When Family Member is the Exploiter

According to the Study, a family member, usually an adult child, has been found to be the perpetrator 60.4% of the time in financial exploitation, another family member has been implicated in 18.9% of the cases, and neighbors or friends were responsible for 8.7% of the exploitation cases.⁴ Particularly in cases involving family members, it can be difficult to distinguish a transfer of assets made with consent from an exploitative transaction resulting from undue influence, duress, fraud, coercion or lack of informed consent.

Both the elder and the perpetrator may feel that the perpetrator has some entitlement to the elder person's assets. This is a primary reason why most criminal cases involve unrelated perpetrators. Other reasons cited include lack of prosecutorial resources, and the need to protect society from perpetrators who may engage in a repeated pattern of conduct against other victims.

Elder exploitation often involves a series of actions taking advantage of the same person. When a family member is involved, conduct that began in the elder's best interest may become abusive over time. For example, many guardians start handling the Ward's affairs properly. After several years, when they see how much work is involved, often they begin to feel an "entitlement" to the funds. Determining when the exploitation began can be difficult.

When a family member is the exploiter, many elderly do not want the perpetrator to "get in trouble" and may change their testimony, or otherwise not be a good witness. Sometimes they may not even be available to testify, or still living, when the case is goes to trial.

III. Application of Nevada Law to Financial Exploitation

In Nevada, there is typically a much quicker resolution in guardianship court than in filing a civil complaint. Accordingly, when a guardianship is in place or is otherwise appropriate, a recovery action should be brought in guardianship court. A citation must be issued to the proposed exploiter pursuant to NRS 159.091 for the return of property belonging to a guardianship estate. NRS 159.091 provides:

Discovery of debts or property. Upon the filing of a petition in the guardianship proceeding by the guardian, the ward or any other interested person, alleging that any person is indebted to the ward, has or is suspected of having concealed, embezzled, converted, or disposed of any property of the ward or has possession or knowledge of any such property or any writing relating to such property, the court may require the person to appear and answer under oath concerning the matter.

A recent addition to the Nevada Revised Statutes provides as follows:

1. If a guardian, interested person, ward or proposed ward petitions the court upon oath alleging:
 - (a) That a person has or is suspected to have concealed, converted to his own use, conveyed away or otherwise disposed of any money, good chattel or effect of the ward; or
 - (b) That the person has in his possession or knowledge any deed, conveyance, bond, contract or other writing which contains evidence of, or tends to disclose the right, title or interest of the ward or proposed ward in or to, any real or personal property, or any claim or demand, the judge may cause the person to be cited to appear before the district court to answer, upon oath, upon the matter of the petition.
2. . . Each party to the petition may produce witnesses, and such witnesses may be examined by either party.
1. If the court finds, after examination of a person cited . . . that the person has committed an act: set forth [above], the court may order the person to return the asset or the value of the asset to the guardian of the estate . . .

3. An order of the court pursuant to subsection 1 is **prima facie** evidence of the right of the proposed ward or the estate of the ward to the asset described in the order in any action that may be brought for the recovery thereof, and any judgment recovered therein must be double the value of the asset, and damages in addition thereof equal to the value of such property.

The court will then determine whether NRS 159.091 is applicable by deciding if the elderly individual was able to make loans or gifts; therefore, the individual's competency must be examined. NRS 159.019 defines an incompetent to include a "...person who, by reason of mental illness, mental deficiency, advanced age, disease, weakness of mind or any other cause, is unable, without assistance, properly to manage and take care of himself or his property." The Uniform Probate Code focuses on the ability to make choices by defining incompetence as "lacking sufficient understanding or capacity to make or communicate responsible decisions." An incompetent person lacks the capacity to enter into certain types of transactions autonomously, one of which is the transfer of assets by contract. See 17A Am. Jur. 2d *Contracts* § 7 (1991); *Restatement (Second) of Contracts* § 12 (1981).

Contractual capacity differs from donative intent or testamentary capacity.⁵ Lack of contractual capacity has been defined as being "incapable of understanding the force and effect of the alleged agreement the capacity to contract involves a person's inability to understand the terms of an agreement" General Motors v. Jackson, 111 Nev. 1026, 900 P.2d 345 (Nev. 1995).

Depending on the jurisdiction, the capacity needed to make gifts may be the same as that to enter into contracts. Some jurisdictions find that the act of *inter vivos* gift giving is akin to a testamentary disposition and thus, only the lesser capacity of

testamentary capacity is required. See 38 Am. Jur. 2d *Gifts* § 13 and 14 (1999); Comment, *A Clarification of the Standard of Mental Capacity in North Carolina for Legal Transactions of the Elderly*, 32 Wake Forest L Rev. 563 (1997); Meiklejohn, *Contractual and Donative Capacity*, 39 Case W. Res. L. Rev. 307 (1989). Nevada law is silent as to the level of capacity required for gift giving.

Based upon the liberal definition of incompetence in the State of Nevada and the relative ease in gaining a guardianship of an individual alleged to be incompetent, the Court has found that an individual can be adjudicated by court order to be incompetent within the meaning of NRS 150.019, but still capable of making testamentary dispositions. As for the competency and ability to make gifts, the case of Ross v. Giacomo, 97 Nev. 550, 635 P.2d 298 (Nev. 1981), provides more guidance.

In the Ross case, the appellant, a long time friend of the deceased, claimed that money she used to purchase real property was gifted to her, and therefore, she had no obligation to repay the estate of the deceased. The appellant claimed that one of the appealable issues was the erroneous jury instruction. The instruction stated, “[a]n alleged gift will be presumed secured by undue influence where the alleged donor is lacking in such mental vigor as to enable him to protect himself against imposition even though his mental weakness is not such as to justify his being regarded as totally incapacitated.” Id., 97 Nev. at 556, 635 P.2d at 302.

Appellant unsuccessfully argued to the district court that an instruction on undue influence was inappropriate since there was no evidence of undue influence. The Nevada Supreme Court disagreed with the appellant and affirmed the district court’s actions by finding that the jury instruction was appropriate because there was substantial evidence of

mental incapacity which was "...highly probative on the question of undue influence."

Id. The Nevada Supreme Court went on to discuss that mental weakness of a donor is an important component of raising the presumption of undue influence. In fact, the Nevada Supreme Court stated: "...where the alleged donor lacks such mental vigor as to enable him to protect himself against imposition, the burden shifts to the alleged donee to prove by clear and satisfactory evidence that the gift was freely and voluntarily made by the donor." Ross, 97 Nev. at 557, 653 P.2d at 302. According to the Nevada Supreme Court, a district court can make a finding of undue influence without there being a specific showing of it.

Undue influence has been described as being "...exercised in secret, not openly, and, like a snake crawling upon a rock, it leaves no track behind it, but its sinister and insidious effect must be determined from facts and circumstances surrounding the testator, his physical and mental condition as shown by evidence, and the opportunity of the beneficiary of the influenced bequest to mold the mind of the testator to suit his or her purposes." Matter of Estate of Davidson, 839 S.W.2d 214, 218 (Ark. 1992) (quoting Hyatt v. Wroten, 43 S.W.2d 726, 728 (Ark. 1931)).

There are generally four elements of undue influence: (1) an individual who is susceptible to undue influence; (2) the existence of a confidential relationship; (3) the exertion of improper influence to secure a change, and (4) a change that was desirable to the influencer. See 25 Am. Jur. 2d *Duress and Undue Influence* § 31 (1996). In examining the elements of undue influence, the court will look for evidence of physical illness, diminished capacity, dementia, use of drugs or alcohol, or mental impairments that compromise an individual's free will when evaluating susceptibility. Estate of

Dossett, 512 N.E.2d 807, 811 (III. 1987); Palmer v. Palmer, 500 N.E.2d 1354 (Mass. 1986); see 25 Am. Jur. 2d *Duress and Undue Influence* § 32 (1996).

The burden of proof which the alleged exploiter needs to sustain to convince the court that he or she: (1) is not indebted to the elderly individual for the value of the asset claimed to be a gift; (2) has not embezzled or converted property belonging to the elderly individual or (3) has not disposed of property belonging to the elderly individual, is found in Ross – *clear and satisfactory*. If the court can find indebtedness, embezzlement, conversion or disposition, because of the lack of capacity or undue influence, the guardian of the elderly individual can choose to pursue double damages as contemplated in NRS 159 if the property or its value is not disgorged. Additionally, the court may find the applicability of NRS 41.1395, which states in part:

1. . . .if an older or a vulnerable person suffers...a loss of money or property caused by an exploitation, the person who caused the...loss is liable for two times the actual damages incurred....

4. For the purposes of this section... (b) “Exploitation” means any act taken by a person who has the trust and confidence...to obtain control, through...undue influence....”

IV. Application to Case

The following is derived from a trial brief presented in an exploitation case, which is a common fact pattern encountered by elder law attorneys. Financial exploiters often choose victims who are vulnerable, isolated, and demented. The exploiter argues that the victim intended to make a gift of the property. Often times, there is little evidence rebutting the exploiter's argument of donative intent.

A. Summary of Facts

Janet Ward and Gerri Grabby met in approximately 1991 when they both resided in the same apartment complex in Las Vegas, Nevada. Over the years, Ward and Grabby shared a close relationship. Grabby claimed to have continually assisted Ward by buying her groceries, taking her out to eat, taking her to the doctor, taking her to the bank, taking her to run errands and helping her to pay bills.

Ward began making unusual withdrawals from her bank account, and the bank officer referred the case to Senior Protective Services. It was discovered that Ward had no recollection of making the various trips to the bank escorted by Grabby nor did she remember making withdrawals and giving Grabby the money. Grabby's name had been added to one of Ward's account by request of Ward. There were excessive ATM withdrawals on Ward's account, yet Ward did not know that she had an ATM card for the account. There were also \$10,000 loans made to Grabby using two of Ward's certificates of deposit as collateral. When Grabby defaulted on the payments to Norwest Bank, Ward's certificates of deposit were taken by the bank to satisfy the loans.

Senior Protective Services discovered the purchase of a house by Ward, in which Grabby was living and had title, although the mortgage was in the Ward's name. The Public Guardian was appointed as Ward's guardian. Grabby is adamant that the money was a gift to her for all her years of assistance, that she "deserved the money." She maintained that the money was given to her for services performed, however, had no contract or gift letter regarding the money.

B. Medical Evidence

Dr. Shrinker examined Ward, and rated Ward with a 40 on Axis V of the DSM-IV on both evaluation dates. Axis V is a global assessment of functioning of an individual, with a perfect score being 100. An individual rated at 50 on Axis V is capable of bathing, shaving, ambulation, eating and acceptable cleanliness; however, their executive decision making ability is absent. See, American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, DSM-IV* (4th ed. 1994).

Shrinker noted that Ward had significant memory loss that impaired her ability to make decisions on her own behalf. Shrinker found that Ward had no memory regarding repeated withdrawals from her accounts nor did she recall signing a deed for the transfer of a house. Shrinker opines that Ward suffers from a “severe, slowly progressive global dementia that has probably been present for a number of years and it continues to slowly progress.”

C. Ward’s Mental Capabilities

Ward fits the definition of NRS 159.019; she is incompetent. The question becomes when did the incompetency reach a level that robbed her the ability to engage in contractual and donative transactions. Even if Ward is found not to possess sufficient capacity to enter into contractual relations, she may have possessed the capacity necessary to give gifts (testamentary capacity).

Capacity and incompetence are measured by the mental and physical state of an individual. In determining capacity and competency, a court is reliant upon the testimony of friends, families, witnesses of specific acts, medical professionals and factual circumstances.

There is testimony by Shrinker, a trusted and recognized court expert, that Ward was not competent to enter into contractual relationships or donative acts in early 1999. Shrinker was positive that Ward was unable to make informed decisions regarding loans and gifts in 1999. Her memory loss significantly impaired her ability to act with good judgment. No independent medical evidence was proffered by Grabby.

There is sufficiently clear, concise and unrefuted medical evidence, as well as lay person observation, to find that Ward has a mental weakness. Furthermore, such mental weakness rose to the level of an incapacitation as of February 1999.

D. Ward's Void Transactions

Ward was incompetent to enter into contractual and gratuitous or donative transactions on or about February 1999. Therefore, all those transactions which Ward undertook either as a loan or gift are voidable and the asset or value of the asset is recoverable as properly belonging in her estate.

Even if Ward was not incapacitated as of February 1999, she fit the profile of an individual lacking in mental vigor and was unable to protect herself from the imposition of Grabby, a woman with whom Ward had great interaction and a strong friendship. Therefore, under the Ross case, there is a presumption that must be overcome by Grabby that the gifts and/or loans were freely and voluntarily made.

Grabby cannot carry her burden of proof. In examining the elements of undue influence, Ward fits the susceptibility component. Courts will look for evidence of diminished capacity or dementia when evaluating susceptibility. Shrinker diagnosed Ward with Alzheimer's, a slow, progressive debilitating disease with no sudden signs of deterioration.

The next factor in undue influence is the existence of a confidential relationship. Such a relationship exists if there is a special trust of confidence between parties. Additionally, there is usually a psychological or physical dependence involved. Bolan v. Bolan, 611 S.2d 1051, 1054 (Ala. 1993). The Florida Supreme Court has defined a confidential relationship as “those informal relations which exist whenever one man trusts in and relies on another. . . . The relation and duties involved in it need not be legal. It may be moral, social, domestic or merely personal.” In re Estate of Carpenter, 253 S.2d 697, 701 (Fla. 1971); See 25 Am. Jur. 2d *Duress and Undue Influence* § 33 (1996).

Ward trusted Grabby to assist in her daily living needs: this included going to the grocery; driving; going to the bank; going to the doctor; and spending large blocks of time together. The relationship began in 1991 and was significant to both women. Grabby was the closest individual to Ward prior to her relocation to California to be with relatives.

The act or influence and effect was for Grabby to better her financial situation and standard of living. Grabby was able to secure a home as a result of her connection with Ward. Grabby was not able to qualify for a mortgage. Therefore, Ward’s credit worthiness was used to secure a mortgage on a home which is currently titled in Grabby’s name. Grabby has no contractual obligation on the mortgage.

There is strong evidence of the frugality of Ward until 1999. Ward had an estimated estate of over \$400,000 in early 1999. The purchase of the home did not result in a change of lifestyle for Ward, something which she could have done for herself years ago based upon her net worth. The desired result benefited Grabby. At the time the home was discovered by the investigative entities, Ward was not deriving the benefit that

Grabby purportedly promised. That promise was that she and Ward would live together forever with Grabby caring for Ward. In fact, at the time the Public Guardian removed Ward from her apartment on Eleventh Street, all her belongings had to be destroyed because of extensive roach infestation.

Ward was the victim of undue influence which was perpetrated by Grabby to benefit herself and solely herself. Grabby had the proximity, the trust and the financial knowledge, not to mention the power of attorney, to be in a position to benefit from Ward. The benefit was derived at a time when Ward was suffering from mental and physical weakness due to dementia. The results of Grabby's acts were selfish and not meant to bestow any sort of benevolent benefit to Ward.

E. Findings of Court

The Court found that the sum of \$70,000 be returned to the estate of Ward. As partial satisfaction of the \$70,000 the house was ordered to be immediately returned to Ward. The Court further found that pursuant to NRS 41.1395, the Public Guardian's attorney's fees and costs were recoverable against Grabby, from the commencement of the action for recovery of property to the date of the decision.

V. Conclusion

As elder exploitation continues to increase, there are more opportunities to help the elderly by being able to address this issue. Even if elder law attorneys choose not to handle litigation matters, they have an obligation to provide good advice. For some people, simply knowing the legal options and taking steps to prevent further exploitation can provide enormous peace of mind.

¹ *Elder Mistreatment: Abuse, Neglect, and Exploitation in An Aging America*, The National Academies Press, p. 391 (2003).

² NRS 41.1395.

³ The Study was published in 1998 by the United States Department of Health and Human Services Administration on Aging using statistics compiled from nationwide Adult Protective Services (APS) as well as reports from specially trained "sentinels." A "sentinel" is a community agency or member who regularly deals with or interacts with elderly individuals and watches or follows the activities of an individual over a specified period of time. Typically, a "sentinel" agency is: a health care provider; senior citizen center; hospital or clinic; law enforcement agency; or financial institution. The full study can be found at www.aoa.dhhs.gov/abuse/report/default.htm.

⁴ The NEAIS identified seven types of abuse and/or neglect: physical abuse; sexual abuse; emotional/psychological abuse; neglect; abandonment; financial or material exploitation; and self-neglect. Combining all categories of abuse and/or neglect into one statistic, the Study revealed that 47% of the time the child was the perpetrator, a sibling represented 6%, a grandchild 9%, a spouse 19%, another relative 9%, a parent 0%, a friend or neighbor 6% and an unrelated caregiver 4%.

Possible signs and symptoms of financial exploitation include: (a) sudden changes in a bank account or banking practice, including an unexplained withdrawal of large sums of money by a person accompanying the elder; (b) the inclusion of additional names on an elder's bank signature card; (c) unauthorized withdrawal of funds using an elder's ATM card; (d) abrupt changes in a will or in other financial documents; (e) unexplained disappearance of funds or valuable possessions; (f) provisions of substandard care or bills unpaid despite the availability of adequate financial resources; (g) the provision of services that are not necessary; (h) discovery of an elder's signature forged for financial transactions or for the titles of the elder's possessions; (i) sudden appearance of previously uninvolved relatives claiming rights to an elder's affairs and possessions; (j) unexplained sudden transfer of assets to a family member or someone outside the family; (k) an elder's report of financial exploitation.

⁵ BAJI 12.05, Will Contest – Testamentary Capacity: A will which is made by a person who is not of sound and disposing mind is not valid. The test for determining if a person is of sound and disposing mind is whether, at the time of making his will, he has sufficient mental capacity to be able (1) to understand the nature of the act he is doing, (2) to understand and recollect the nature and situation of his property, and (3) to remember and understand his relations to his living descendants, spouse and parents and whose interest will be affected by the will. Mental incompetency to make a will must be shown to have existed at the very time the will was executed, although evidence of mental unsoundness before or afterward must be considered in determining the decedent's mental condition at the time the will was executed.