

ESTATE PLANNING CAN PREVENT OR LEAD TO ELDER ABUSE

by Kathleen Whitney, Attorney at Law

Estate planning refers to the ordering of your affairs so that you will be taken care of during your life and the your assets will be managed if you become incapacitated, and your assets pass as the you wish after death. Estate planning devices may include wills, trusts, powers of attorney, living wills, and joint tenancies.

Unfortunately, elders are targets of financial abuse. People you trust may take advantage of powers you have given to them in estate planning devices. An example is a power of attorney, which can prevent elder abuse if the you choose someone you trust to make personal care decisions and manage financial affairs for you when you are unable to and if the power of attorney contains clear directions that reflect your wishes. On the other hand, a power of attorney can lead to elder abuse if it contains improper powers or powers you do not want the agent to have, such as the power given to the agent to make gifts to himself or the power to place you in a psychiatric facility. You should be aware of circumstances that may lead to abuse.

1. Do you lack the capacity to execute documents:

You are presumed to have the mental capacity to sign estate planning documents unless found by a court to lack capacity. Incapacity occurs when you are impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, etc., to the extent you lack sufficient understanding to make or communicate responsible decisions.

2. Is someone exercising undue influence you:

Undue influence is present when (1) there is confidential relationship between you and another person; (2) you suffer weakness of mind in relation to the influential person; and (3) the person gains unfair advantage over you. Undue influence is present when someone isolates you from family and friends and then convinces you to execute estate planning documents in that person's favor.

3. Is there a conflict of interest between you, the person preparing your estate planning documents, and another person:

A conflict of interest occurs when a person who is going to benefit from your estate planning, such as a beneficiary to your will, brings you to a



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financial planner or attorney, directs the professional advisor as to what is going to be done, and/or pays the professional advisor's fees. An example is an adult child who takes her parent to a financial planner to qualify the elder for Medi-Cal, tells the financial planner to sell the elder an annuity that will not benefit the elder, but will benefit the adult child upon the elder's death.

4. Who might financially abuse you?

Conservators, Caregivers, Agents acting under durable powers of attorney, Trustees, Representative Payees, Financial Planners, Attorneys, Family Members, and Friends.

5. Are there remedies for financial abuse?

The best remedy is to prevent the abuse by carefully choosing trustworthy people to act as agents, successor trustees, or conservators when preparing estate planning documents. However, if you believe that a person already designated is not acting in the your best interests, you can amend or revoke a power of attorney or revocable trust. You can demand an accounting. If there is evidence of mismanagement, the agent can be required to make restitution to you. Victims can seek assistance from law enforcement or file a civil lawsuit. Punitive damages are available if there is evidence of oppression, fraud, or malice.

6. Who may bring an action?

The victim, elder's conservator, the victim's spouse or agent acting under a durable power of attorney, other relative, Public Guardian, or an "interested person".

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