# Financial Elder Abuse – A Brief Overview of Its Forms, Causes and Remedies

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# I. INTRODUCTION

The financial elder abuse epidemic has become so widespread it is now often called the "crime of the twenty-first century." As an aging society, with approximately 10,000 Americans turning 65 every day, our stage is set for the problem to only get worse. According to the National Adult Protective Services Association (NAPSA), nearly 5 percent of seniors surveyed reported perceived financial mistreatment. According to the National Council on Aging, 10 percent of Americans over the age of 60 experience some abuse ***each year*** – as many as 5 million seniors annually. Financial abuse is not only the most common form of that elder abuse, it is also the fastest growing and perhaps the least reported. By one estimate, only 1 in 44 victims reports the crime.[1]

The federal and some state legislative bodies have enacted laws intended to curb elder abuse. The problem has also garnered the attention of the judiciary. Some jurisdictions, like Cook County Illinois, have created "Elder Courts" – a specialized court which the American Bar Association has called a workable model providing legal access for elders. There has also been a special effort to educate the judiciary: California's Judicial Council, together with the University of California Irvine Medical School, created a special guide for judicial officers in an effort to facilitate a higher level of understanding of the elder abuse problem.

The magnitude and seriousness of the financial abuse problem has spawned a plethora of articles and resources. This presentation offers a perspective of the forms, causes and legal remedies for financial abuse from an attorney who has devoted more than a decade to representing elderly victims of financial abuse.

# II. THE MANY FORMS OF FINANCIAL ELDER ABUSE

## A. Financial Elder Abuse By Family Members And "Friends"

While the array of financial elder abuse scams is both broad and evolving, studies indicate most elder abuse is committed by the elder's family members or trusted others. Financial abuse by family members or trusted others, often referred to as "domestic financial elder abuse," is the economic exploitation of an elder by family members, caregivers, acquaintances and neighbors that often involves the transfer of an elder's property or an inappropriate bequest obtained through undue influence. By exerting undue influence, the family member or trusted other is able to obtain the elder's property or control over that property, and does so under circumstances that are likely to be harmful to the elder.

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[1] The actual prevalence of financial abuse is hard to know. While one study indicates 1 in 10 older adults is abused each year (all types of abuse), another study indicates that, when swindles are included, 1 out of 5 elders is abused every year (swindles can include "inappropriate investments, unreasonably high fees for financial services, or outright fraud"). Moreover, the apparently huge under-reporting problem suggests that even those disturbing statistics may be materially understated.

While the fact that financial abuse is committed by a family member or trusted other may make a prosecution somewhat more complicated, it does not make the financial abuse any less of a crime. Criminal prosecutions are important not only to end abuse and deter others, but also because they provide an opportunity for restitution.

### B. Commercial Financial Elder Abuse

NAPSA defines commercial financial abuse, another all too common form of financial elder abuse, as the economic exploitation of elders by sellers of products and services. Commercial financial abuse often involves issues of capacity to contract, undue influence and/or misrepresentation. The perpetrators use a variety of tools, including deceptive advertising, misleading promotions, "free-lunch" seminars, in-home sales presentations, assistance with obtaining government benefits (e.g., Medi-Cal or Veteran's Aid & Attendance Benefits), "sweepstakes" scams, "phishing" emails or fraudulent phone calls purporting to be from the IRS, Social Security Adminstration, FBI or other governmental/law enforcement entity.

## III. THE ANNUAL TOLL OF FINANCIAL ELDER ABUSE

Estimates of annual losses caused by financial elder abuse vary widely. A 2009 MetLife study estimated the annual losses to be $2.6 billion, a 2015 Truelink study put the annual losses at $36 billion. Both of those studies suffer from methodological flaws. For more on this, see Financial Elder Abuse Costs $3 Billion a Year. Or Is It $36 Billion? Perhaps the most significant point here is what the vast gap between those two estimates says about society's continuing ignorance of the financial elder abuse problem.

Moreover, both the MetLife and Truelink studies focus solely upon the economic losses suffered by elderly victims of financial abuse. As the Truelink study noted, the estimated losses do not include any valuation of the enormous distress most elderly victims suffer.[2]

## IV. TYPES OF FINANCIAL ABUSE SCAMS

Financial abuse scams also vary widely but include the following ploys:

- **Family and Caregiver Theft or Overreaching:** Given their positions of trust and the dependence of the elder (and other factors discussed below), family members and caregivers are uniquely situated to exploit an elder's vulnerability to obtain the elder's property.

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[2] Most elders' emotional and mental health tends to be dependent upon his or her sense of financial security. Thus, a financially abused elder's emotional distress can be a significant multiple of his or her economic losses. By way of example, last April a jury in Butte County California awarded an 81-year-old financial abuse victim $600,000.00 for the emotional distress he suffered as a result of losing $18,309.41.

- **Trojan Horse Scammers:** Abusers often create nonprofits which "educate" elders on topics of interest (Medi-Cal planning, veterans benefits, living trusts, etc.). A free lunch is often provided and the nonprofit gains the trust of elders in order to sell financial products.

- **Sitting Duck Senior Centers**: Senior centers are prime targets for trojan horse scammers. Senior centers looking for programing often trust scammer's "nonprofits" and assume they will provide impartial education and advice to participants.

- **Tax Prospectors**: Abusers go into business as tax preparers to gain access to elders' financial information. They then pitch long-term care insurance, investments, deferred annuities and reverse mortgages.

- **Radio Show Host Swindlers**: Abusers buy airtime to pitch investment advice and products directly to elders.

- **Professional Misconduct:** Accountants, insurance agents, loan brokers real estate agents and attorneys may exploit their "expertise" to induce an elder into a transaction or a decision which unduly benefits the professional but is likely harmful to the elder.

- **"Sweepstakes" Scams:** Typically, abusers use the pretense that an elder has won a significant prize or award and need only prepay the taxes to obtain the promised prize or award.

- **Impersonation Scams**: One common form involves the financial abuser impersonating IRS representatives in an effort to intimidate elders into making purported overdue tax, interest and penalty payments. Another involves the abuser impersonating a representative of the Social Security Administration to obtain an elder's social security number, which can then be used for identity theft.

- **Computer Tech Scams**: Abusers contact an elder under the pretense of providing unsolicited technical assistance over the telephone and exploit the elder's lack of technological sophistication to obtain access to financial information on the elder's computer.

- **Grandparent Scams**: An elder receives a call from an abuser pretending to be a grandchild (or someone calling on behalf of or about the grandchild) and claiming the grandchild is facing some kind of legal or medical problem (e.g., arrest or hospitalization) requiring immediate financial assistance. The caller then attempts to get the grandparent to transfer money via Western Union, Moneygram or some other similar vehicle.

- **Romance or "Sweetheart" Scams:** In these common scams, the abuser exploits an elder's trust and loneliness to induce the elder to gift or transfer property or other wealth to the purported new "love."

## V. CAUSES OF FINANCIAL ELDER ABUSE: WHY ARE ELDERS TARGETS?

There are several reasons why so many elders become targets of financial abuse. They include, on one hand, the elder's mental and physical status and circumstances and, on the other hand, the abuser's tactics.

### A. The Elder's Mental And Physical Circumstances

- **Physical Vulnerability, New Needs:** An elder's increased reliance on others due to physical limitations can increase risk for abuse.

- **Isolation or Social Butterfly:** Both are risk factors for abuse.

- **Neurological Vulnerability**: Normal aging can affect the brain's executive functioning. These cognitive deficits are often not perceptible and will not rise to the level of dementia or even pre-dementia. A series of three studies found that (1) a sizeable subset of elders (approximately 35-40%) perform disadvantageously on decision making tests and display responses established in patients with acquired prefrontal lesions and (2) such poor decision-makers are more likely to fall prey to deceptive advertising, suggesting compromise of real-world judgment and decision-making abilities.

- **Financial Vulnerability:** Elders with substantial assets are more at risk for financial abuse and abusers will skillfully target both liquid assets and money tied up in homes, pensions, investments, etc.

### B. The Abuser's Tactics

The perpetrators or financial abuse often use tactics designed and intended to exploit the elder's mental and physical status and circumstances. Those tactics include the following:

- **Engender Trust:** The abuser claims to be an authority or expert on certain kinds of services or financial products. He or she then offers initial services for free or at a discounted rate and tells the elder that he or she considers that elder "family."

- **Isolate:** The abuser finds an already isolated elder with few social supports or draws the elder away from family, friends or professionals who have provided impartial advice in the past. The abuser then discourages the elder from seeking out the financial or legal advice of others.

- **Manipulate:** The abuser guilts and/or bullies an elder into believing the abuser is the only one who can meet the elder's needs. In the case of certain financial schemes, the abuser convinces the elder that he or she is indebted to the abuser and/or colluded with the abuser to do something illegal.

- **Bait and Switch:** The abuser promises one service or product, then delivers another, including care contracts, financial products, legal documents, etc.

### C. Risk Factors And "Red Flags" Of Financial Elder Abuse

There are several risk factors and "red flags" indicating the vulnerability of an elder to financial abuse. The following are just a few examples:

- **Death of Spouse:** A long-term spouse who handled finances dies.

- **Changes in Financial Habits:** There are new or unusually frequent ATM withdrawals, bounced checks, missed credit card payments, purchases of unsuitable products or services, or leveraging of or taking out loans on property.

- **New "Friend" or Long Lost Resurfaced Relative:** Someone facilitating financial habits is named as a fiduciary or appears on title or financial accounts.

- **Elder Removed from Radar of Friends and Loved Ones:** An elder may suddenly become distrustful of those who were formerly central to his or her life.

- **Change in Appearance/Eating Habits/Behavior:** An elder suddenly doesn't have enough money to provide for his or her basic needs.

- **Estate (Re)planning:** An elder changes his or her will or trust and names a new "friend" as trustee and/or beneficiary.

## VI. REMEDIES AND RESPONSES TO FINANCIAL ELDER ABUSE

Because financial elder abuse is both a crime and a tort, the remedies and responses can follow both civil and criminal tracks. This section will address the civil remedies which may be available to victims of financial elder abuse.

## A. Common Law Remedies

Remedies under several common law theories may be available depending upon the particular circumstances, including one or more of the following:

- **Negligence**: The available remedies may include breach of a duty of care, enabling recovery of compensatory damages for which such negligence was a substantial cause, and remedies based upon negligence *per se* where the conduct at issue violated a statute enacted to protect a class (elders are members of a protected class) and prevent the type of harm the elder suffered.

- **Fraud:** Many forms of financial abuse fit within the common law definition of fraud and may entitle an elder to compensatory damages as well as exemplary damages where the fraud was committed with malice or oppression.

- **Breach of Fiduciary Duty**: Where the financial abuses arises from circumstances indicating the existence of a "special relationship" between an elder and an abuser, the latter's abusive conduct may constitute a breach of a fiduciary duty.

- **Conversion**: By definition, much of the financial abuse which involves the taking of tangible property constitutes a "conversion" of an elder's property and may give rise to an action for conversion.

## B. General Statutory Remedies

Many states have statutes of general application which provide a private right of action and may encompass financial abuse. For example:

- **Consumer Protection Statutes**: California's Consumers Legal Remedies Act prohibits 26 different unlawful acts and practices and provides enhanced remedies where the victim is a senior.

- **Unfair Competition Statutes**: California's Business & Professions Code includes an Unfair Competition Act (UCL) which is designed to protect against deceptive business practices, including deceptive advertising. The UCL allows consumer claims, including consumer class actions, provided the consumer can show loss of money or property as a result of the deceptive business practice/unfair competition. Its remedies are generally limited to restitution and injunctive relief but the UCL also provides for civil penalties, payable to the state, where the unfair competition is targeted at seniors.

- **Regulatory Statutes**: Regulatory statutes such as those which regulate the insurance industry may also provide protections and remedies for elders. For example, California's Insurance Code contains a series of "Senior Insurance Provisions" which include a provision imposing upon the insurer and its agent a duty of honesty, good faith and fair dealing when dealing with a prospective insured over the age of 65.

## C. Statutes Enacted To Protect Elders From Abuse

Many states have enacted laws specifically designed to address the elder abuse problem. This section will summarize pertinent provisions from California's statute.

### 1. The Elder Abuse and Dependent Adult Civil Protection Act

California enacted the Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act) in 1982 and it has repeatedly amended and strengthened its protective provisions over the last 37 years. The Elder Abuse Act, premised upon a series of findings and declarations which recognize elders' and dependent adults' vulnerability to abuse, expressly declares the State's responsiblity to protect them and includes both incentives and enhanced remedies. As a remedial statute, the Elder Abuse Act is to be liberally construed on behalf of the class of persons it is designed to protect. *Mahan v. Charles W. Chan Ins. Co.* (2017) 14 Cal.App.5th 841, 860-61.

### 2. The Elder Abuse Act's Broad Definition of "Financial Abuse"

Under the Elder Abuse Act, financial abuse occurs whenever a person or entity does, *or assists*, any of the following:

- takes, secretes, appropriates, obtains or retains an elder's interest in real or personal property for a wrongful use or with intent to defraud or both; OR

- does any of the above described acts through "undue influence" as defined in the Elder Abuse Act.

### 3. The Conclusive Presumption of Financial Abuse

In 2008, the California Legislature amended the definition of financial abuse, effectively creating a conclusive presumption of "financial abuse" whenever a person or entity obtaining the elder's property knew, or should have known, their conduct was likely to be harmful to the elder. The conclusive presumption of "financial abuse" arguably extinguishes the doctrine of *caveat emptor* in transactions with California's elders. By adding the "or should have known," the Legislature expanded the definition of financial abuse to encompass negligent conduct – a person's or entity's conduct does not need to be intentional to be actionable as financial abuse.

### 4. What Actions Constitute "Taking" Property

Under the Elder Abuse Act's definition of "financial abuse," a person or entity takes, secretes, appropriates, obtains or retains an elder's property whenever an elder is deprived of any property right. The definition of taking, etc., also reaches actions accomplished by means of an agreement, a donative transfer or a testamentary bequest. It does so without regard to whether the property is held directly by an elder or by the elder's representative.

### 5. The Elder Abuse Act's Heightened Remedies for Financial Abuse

The Elder Abuse Act provides a financially-abused elder with the following enhanced remedies:

- "[C]ompensatory damages and all other remedies provided by law;"
- A unilateral mandatory right to recover reasonable attorneys' fees and costs;[3]
- A right to obtain a restraining order;
- A right to obtain a writ of attachment without showing the claim is for money, based upon a contract for a fixed or readily ascertainable amount not less than $500.00, unsecured or secured by personal property and a commercial claim.

### 6. Failure to Return an Incompetent Elder's Property Constitutes Financial Abuse

Recognizing that incompetent elders may improvidently give away their property without any wrongdoing on the part of the recipient, the Elder Abuse Act provides a remedy to an elder who lacked capacity or was of unsound mind when his or her property was taken. To trigger those remedies the elder's representative must demand return of the property and the person or entity must fail to return it. When the taking is from a person of unsound mind and the person or entity fails to comply with the demand, all of the remedies for financial abuse are available.

[3] The elder's unilateral right to recover attorneys' fees "trumps" a prevailing party's contractual right to recover attorney's fees. *See Wood v. Santa Monica Escrow Co.* (2007) 151 Cal.App.4th 1186). In *Wood*, the court not only affirmed a prevailing elder's unilateral right to recover attorneys' fees, it went on to hold that, where each of the plaintiff's claims, including the elder abuse claim, arose from a single transaction, the Elder Abuse Act precludes any award of attorney fees to a prevailing defendant, even as to the non-elder abuse claims. Notably, the court reached this conclusion even though the plaintiff in *Wood* had voluntarily dismissed his claims and the prevailing defendant claimed a contractual right to attorneys' fees for defense of plaintiff's tort claims. *Wood*, at p. 1190.

### 7. Settlement Limitations

California law subjects the settlement of financial abuse claims to two special limitations:

- Confidential settlement agreements are disfavored and unenforceable in any civil action asserting a financial abuse claim.

- Similarly, any provisions which attempt to "gag" or prevent a plaintiff from making complaints to appropriate regulatory agencies, or provisions which require the plaintiff to withdraw those complaints, are prohibited.

## D. Alternative Remedies

In many financial elder abuse cases, the circumstances may render litigation impractical. The defendant(s) may be substantially impecunious. Or, an elder may be unable or unwilling to bear the demands of being a civil litigant. This reality is not uncommon in the domestic financial abuse arena where the abuser is a friend or family member. However, civil litigation may not be a victimized elder's only potential source of a remedy. Statutes mandating the reporting of suspected financial abuse, or the voluntary reporting of such abuse, can trigger an investigation by Adult Protective Services resulting in a criminal prosecution potentially providing restitution to the elderly victim.[4]

In domestic financial abuse cases, where there are relationships and other factors militating against litigation, the parties may be better served by "Collaborative Mediation." In California, Adult Protective Services workers have been trained to consider Collaborative Mediation as one of the financially-abused elder's options.

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[4] One conundrum arises where the suspected financial abuse is identified by the victim's attorney (e.g., an estate planning attorney), who is bound by the attorney-client privilege and thus may be ethically (and statutorily) prohibited from disclosing information about the suspected financial abuse where that information was obtained through confidential communications.