



## FEATURE: ELDER CARE

By **Bruce D. Steiner**

# Protecting Against Elder Financial Abuse

A trust may be the most effective solution

**T**here's no way to know the extent to which elder financial abuse takes place. However, anecdotal experience suggests that it's common. Elder financial abuse can take many forms, including:

- Taking assets from the elderly;
- Convincing elders to give assets to predators;
- Selling inappropriate investments or financial products to the elderly;
- Charging excessive fees;
- Convincing elders to give predators powers of attorney (POAs) and using the POAs to benefit themselves;
- Convincing elders to sign wills favoring the predators;
- Convincing elders to transfer assets to trusts;
- Convincing elders to name or change beneficiaries;
- Convincing elders to give more money to charity than they would otherwise give; and
- Convincing elders to give money to charities other than the ones they would otherwise favor.

For convenience, I refer to vulnerable individuals as “elders.” However, depending on the nature of the disability, the same issues may arise with an individual of any age with a disability.

The predator may be an acquaintance, a household employee or a member of the same church or synagogue. However, the predator may also be a family member, such as a spouse with children from a previous marriage or a child seeking a larger share of the elder's estate or seeking to obtain assets during the elder's lifetime.



**Bruce D. Steiner** is an attorney with Kleinberg, Kaplan, Wolff & Cohen, P.C. in New York City

## Other Schemes

Abuse isn't always in the form of misappropriating assets. A predator could convince an elder to purchase expensive or inappropriate investments or financial products. These investment or financial products may come with high expenses or surrender or other fees, or they may be illiquid. To purchase them, the elder may sell appreciated assets, triggering capital gains taxes that could be avoided by continuing to hold the assets until death. The elder may cash in U.S. Savings Bonds, accelerating income taxes, giving up various tax options and possibly giving up above-market interest rates.

The elder may transfer his account to a different broker or financial institution. A predator or the new broker or financial institution may convince the elder to designate transfer-on-death beneficiaries, thus defeating the elder's estate plan and making it more difficult for the executors and the intended beneficiaries to attempt to recover the assets.

## Possible Solutions

Because predators are likely to prey on the most vulnerable elders, it's helpful for an elder to have one or more trusted individuals to protect him. For example, a trusted child or other relative could handle the elder's financial affairs. However, because the predator is often a child or other family member, this isn't always sufficient to protect the elder.

A POA is a useful way of allowing someone else to handle the elder's affairs. However, like giving a child a duplicate set of keys to a car, the elder retains the same power to handle his affairs and to make gifts or transfers that he had before.

People often suggest revocable trusts as a way to protect against elder financial abuse. The typical revocable trust provides some degree of protection against abuse. Because the elder retains the power to



withdraw assets from the trust or to amend or revoke the trust, the elder remains vulnerable to predators in the same way as with a POA. However, the agent can move most of the assets to different financial institutions, making it harder for the elder to access them without amending or revoking the trust.

The most dramatic solution is for the elder, or a friend or family member, to petition to have a guardian appointed for the elder. That will protect the elder's assets from both the elder himself, as well as his predators. However, guardianships are expensive and cumbersome, requiring court proceedings, medical evaluations, court-appointed attorneys or guardians ad litem and court accountings. If no one in the family is available to serve, or the family can't agree on the appointment of a guardian, the court may appoint a neutral person or agency, who may or may not do a good job. Depending on the circumstances, the court may decline to appoint a guardian.

The most effective solution is to create a trust that the elder may not amend or revoke without the consent of a trusted individual(s). As with a guardianship, this protects the elder against both himself as well as his predators, but without the cumbersomeness and expense of a guardianship. This is most commonly done when the elder is declining but has sufficient capacity to create a trust and is concerned about a particular predator.

### Picking the Right Individual

The elder must carefully consider the choice of the individual(s) whose consent will be required to amend or revoke the trust. The chosen individual may not agree with the elder on what actions are in the elder's best interest. For example, in *Dunn v. Patterson*,<sup>1</sup> Charles and Charlotte Dunn created a joint revocable trust that couldn't be amended without the consent of both spouses (or the surviving spouse if only one spouse was then living) and either the drafting attorney, Lawrence Patterson, or a court. The Duns subsequently changed law firms, and their new attorney wrote to Patterson asking him to consent to his removal from the trust. Patterson refused to consent to the amendment of the trust without first meeting with the Duns to determine whether the changes were consistent with their estate plan and otherwise in their best interests. The Duns brought a declaratory judgment action against Patterson. The trial court held that the provision in ques-


tion was void and awarded sanctions against Patterson for attorney's fees. Patterson appealed. The appellate court reversed, noting that the attorney is often the client's most trusted friend and advisor.

If there's no trusted friend or family member available to serve as a trustee or co-trustee, a bank or trust company could be a trustee. While there's some cost to having a corporate trustee, it offers the additional protection against the possibility of an unwise choice of trustee. It also protects against a situation such as in *Patterson*, in which it wasn't clear from the court opinions whether the prior attorney was acting in the interests of his former client.

### Individual Retirement Accounts

Many middle and upper middle class clients have a large portion of their assets in IRAs. There's no authority that would permit an IRA owner to transfer his IRA to a trust for his own benefit. However, in PLR 201150037 (Sept. 23, 2011), the Internal Revenue Service approved placing guardrails on IRA distributions in excess of the required distributions so they couldn't be made until 30 days after the IRA owner's request, and the custodian had to notify the IRA owner's attorney of any such requests.

### Protecting Inheritances

Short of creating a trust that the grantor may not amend or revoke without the consent of one or more trusted individuals, it's difficult for an elder to protect his own assets. Moreover, as noted above, an IRA owner may not transfer his own IRA to a trust. However, it's easier to protect inheritances. A client may provide for his beneficiaries in trust rather than outright. Even if the beneficiary is a trustee, he may not participate in discretionary distributions to himself (except as limited by an ascertainable standard) without adverse estate tax consequences. To provide better creditor protection, the better practice is to prohibit a trustee who's a beneficiary from participating in any discretionary distributions in his own favor, leaving such decisions to the other trustees. For additional protection, if the beneficiary is a trustee, he may at some point resign as a trustee or allow the other trustee(s) to take the lead role in administering the trust. 

### Endnote

1. *Dunn v. Patterson*, 395 Ill. App.3d 914 (3d Dist. 2009).